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Supreme Court of the United States

October Term, 1990

ARTHUR S. LANGENDERFER, INC., NORTHERN OHIO ASPHALT PAVING CO., MACRITCHIE MATERIALS, INC., M & B ASPHALT CO., and G. M. SADER EXCAVATING & PAVING CO.,

Petitioners,

vs.

S. E. JOHNSON COMPANY, S. E. JOHNSON COMPANIES, INC., THE OHIO ENGINEERING COMPANY, FRED R. CREAGER & SONS, INC., MATCO, ASPHALTIC CONCRETE PRODUCING CO., OAMCO, INC., C. P. CALAWAY, INC., MAUMEE STONE COMPANY, MICHIGAN STONE COMPANY, WOLCOTTVILLE SAND & GRAVEL CORP., SAXON DEVELOPMENT COMPANY, STONECO, INC. and J. T. KIRKBY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In reversing jury verdicts for plaintiffs in a Sherman §2 monopoly case, is it a violation of the Seventh Amendment's proscription against the re-examination of any fact found by a jury, for a Court of Appeals:

(a) *sua sponte* to redetermine and reduce damages by an implicit extension of *Matsushita* on the ground "that some of the dollar figures offered by plaintiffs and their experts simply fail to reflect economic reality and we shall make adjustments accordingly" when the amount of the verdicts was never challenged by motions in the trial court for directed verdict, *j.n.o.v.*, or new trial and was never raised or argued on appeal;

(b) *sua sponte* to hold that a plaintiff only suffered indirect injury and lacked antitrust standing under *Associated General Contractors* when the defendants failed to raise the issue either in the trial court or on appeal;

(c) to hold that plaintiffs also had to prove that defendants monopolized individual counties within a thirteen county relevant geographical market, even though the Court of Appeals affirmed the jury's finding that defendants monopolized the whole thirteen county area;

(d) to hold that plaintiffs had failed to prove that defendants monopolized the *production* of all highway construction materials, although the plaintiffs' contention and the jury's express findings were that defendants monopolized *the supply* of highway construction materials used only on asphalt paving jobs that defendants were also found to have monopolized; and

(e) to hold, as a matter of law, that the evidence was insufficient to support a jury's finding that a defendant controlling an essential facility refused to deal with the plaintiff/customer for retaliatory and anticompetitive reasons rather than for genuine credit reasons when the Court itself is "persuaded" that plaintiff's claim "has arguable merit."

2. Whether, as a matter of law, a prevailing antitrust plaintiff can be refused all attorney's fees and costs for the first nine years of legal effort in successfully prosecuting a monopoly case over fifteen years.

3. On retrial of a case, when a second jury returns a larger verdict for the original plaintiffs which includes the damages awarded on the original vacated judgment, are the original plaintiffs entitled to interest on the original amount from the date of that first judgment.

RULE 29.1 STATEMENT

Material Suppliers of Northwest Ohio, Inc., an Ohio corporation, is a non-wholly owned subsidiary of Northern Ohio Asphalt Paving Co. All other companies and subsidiaries are wholly owned.

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No. _____

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Supreme Court of the United States

October Term, 1990

ARTHUR S. LANGENDERFER, INC., NORTHERN OHIO ASPHALT PAVING CO., MACRITCHIE MATERIALS, INC., M & B ASPHALT CO., and G. M. SADER EXCAVATING & PAVING CO.,
Petitioners,

vs.

S. E. JOHNSON COMPANY, S. E. JOHNSON COMPANIES, INC., THE OHIO ENGINEERING COMPANY, FRED R. CREAGER & SONS, INC., MATCO, ASPHALTIC CONCRETE PRODUCING CO., OAMCO, INC, C. P. CALAWAY, INC., MAUMEE STONE COMPANY, MICHIGAN STONE COMPANY, WOLCOTTVILLE SAND & GRAVEL CORP., SAXON DEVELOPMENT COMPANY, STONECO, INC. and J. T. KIRKBY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The petitioners, plaintiffs below, Arthur S. Langenderfer, Inc., Northern Ohio Asphalt Paving Company, MacRitchie Materials, Inc., M&B Asphalt Co., Inc., and G.M. Sader Excavating and Paving Co., Inc., respectfully request that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit entered on October 29, 1990, reversing jury verdicts for the second time.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 917 F.2d 1413 ("*Langenderfer II*") and appears in the Appendix hereto at A1-71.[1] The district court rendered a written opinion appended hereto (A91) denying respondents' motions for *j.n.o.v.* or a new trial. That opinion is unofficially reported at 1987-1 CCH Trade Cases ¶67,553. The attorney's fee and costs opinion of the district court affirmed by the Court of Appeals is reported at 684 F. Supp. 953 (N.D. Ohio W.D. 1988) (A102). The district court's Interest Opinion is unofficially reported at 1987-2 CCH Trade Cases ¶67,858 (A98). The earlier opinion of the Court of Appeals in this case is reported in 729 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984) ("*Langenderfer I*").

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1990 (A72). A timely petition for rehearing and suggestion for rehearing *en banc* was denied on January 23, 1991 (A122). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1] Citations to the Appendix to this petition are in the following form ("A____"). The pages in the Joint Appendix in the Court of Appeals are cited as "JA," with original transcript page citations appearing as "TR____." Exhibit references are PX for plaintiffs (petitioners) and DX for defendants (respondents). Emphasis is petitioners' unless otherwise noted.

CONSTITUTIONAL PROVISION INVOLVED

The action of the Court of Appeals in reversing unanimous jury verdicts directly involves the application of the Seventh Amendment to the Constitution of the United States which provides that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATUTES INVOLVED

The suit involves applications of Section 2 of the Sherman Act, 15 U.S.C. §2, Section 4(a) of the Clayton Act, 15 U.S.C. §15(a) and the Federal Interest Statute, 28 U.S.C. §1961. These statutes appear at A124-25.

STATEMENT OF THE CASE

A. Overview of the Decision Below

This fifteen year old Sherman §2 monopoly case has been tried twice and each time a different but unanimous jury has found for plaintiffs (the petitioners) and returned substantial damages. Each time a different trial judge has overruled defendants' (respondents') motions *j.n.o.v.* and for a new trial, holding that the juries' verdicts were supported by the evidence and the law. Now for the second time, the Sixth Circuit Court of Appeals (two of the same judges[2] sitting) has overturned the result below (with one exception) largely on the grounds of insufficient evidence. "[W]hen two juries have reached substantially the same result, the possibility of a miscarriage of justice is very slight." 11 C. Wright & Miller, Fed. Prac. and Proc. §2803, p. 35 (1973). The District Judge found no "miscarriage of justice" and sustained the verdicts below (A91-97).

[2] The same two appellate judges formed the majority which reversed plaintiffs' unanimous verdicts on both appeals in *Langenderfer I*, 729 F.2d 1050 and *Langenderfer II*, 917 F.2d 1413. The same judge wrote the opinion each time.

The Sixth Circuit reversed and vacated actual damage verdicts aggregating $2,425,000, thereby awarding nothing to four of the plaintiffs and reducing the award to the fifth plaintiff, Langenderfer, by two-thirds to $471,104. All plaintiffs participated within the contiguous thirteen county relevant market in Northwestern Ohio that the Court found the defendants monopolized. From 1972 to 1985, defendants monopolized 75% to 85% of all Ohio Turnpike paving and 40% to 80% of all Turnpike and State (ODOT) paving in that market (PX 69SA, 71A, C). After eighteen years, defendants' monopoly remains intact today.

In overturning the jury's verdicts and the trial court's rulings, the Court of Appeals *sua sponte* decided legal and factual issues not raised or preserved below and never argued on the appeal. It violated the traditional and generally accepted rules of appellate procedure and limited review. It redetermined damages although the amount of damages had not been challenged. It totally missed a key relevant product market issue and misconceived the application of law to relevant geographical markets which changed the outcome of the case, *all in disregard of the jury's express findings in answers to special interrogatories drafted by defendants.* It substituted its judgment for that of the factfinder. Its lengthy opinion (A1-71) is replete with *de novo* factfinding premised on: theories and arguments never advanced by defendants; defendants' evidence rejected by the jury; improper inferences, misconceptions and self-contradictory conclusions drawn from conflicting evidence; and a general disregard of the plaintiffs' key evidence which has been accepted by two different and unanimous juries, two different trial judges, and *even by the Sixth Circuit itself in Langenderfer I,* 729 F.2d at 1053-54.

We respectfully submit that the Sixth Circuit's announced vision of "economic reality" is an unwarranted extension of the summary judgment standard that this Court enunciated in *Matsushita*

Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), and deprives plaintiffs of appellate due process and violates the Seventh Amendment to the Constitution of the United States which guarantees "that the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." This Petition raises serious Constitutional and antitrust issues which implicate a Court of Appeals' power to disregard a jury's express findings of fact. The questions presented have far-reaching application to all appeals from jury verdicts and do not just apply in antitrust cases. The broad policy issues at stake here require the Supreme Court's review in the exercise of its supervisory responsibilities over the appellate courts.

B. The Parties

Petitioners and plaintiffs below, Arthur S. Langenderfer, Inc. ("Langenderfer"), Northern Ohio Asphalt Paving Company ("NOAP"), MacRitchie Materials, Inc. ("MacRitchie Materials"), M&B Asphalt Co., Inc., ("M&B"), and G.M. Sader Excavating and Paving Co., Inc. ("Sader") all competed against the defendants in the asphalt paving market within a contiguous area of thirteen counties in Northwestern Ohio surrounding Toledo (*e.g.*, PX 1).

Langenderfer was in the asphalt highway paving business for 65 years in the thirteen counties until driven out by defendants in 1978 (JA 734-35; TR 163-64). NOAP produced the hot mix asphalt used by Langenderfer in its paving business until driven out in 1980. MacRitchie Materials owns a quarry at West Millgrove which supplied road stone and sand to Langenderfer and NOAP for paving and asphalt production. Langenderfer, NOAP and MacRitchie Materials were sister companies, all commonly owned by the MacRitchie family (JA 734-38, 749; TR 163-67, 178).

M&B was also an asphalt paver which competed against defendants and owned a single hot mix asphalt plant at Maple Grove, within the thirteen counties (JA 1831-33, 1858-68; TR 1789-90; 1815-25). Sader was a small paving contractor in the Bowling Green area which competed against defendants on private and local government paving projects. Sader had no asphalt plant or quarry and depended on defendants' Portage (near Bowling Green) quarry and asphalt plant until defendants cut him off in 1983 (JA 1127-43, 1167-171; TR 758-74, 798-802).

Defendants are a closely held, commonly owned enterprise resulting from thirteen acquisitions managed as an integrated unit by defendant John T. (Ted) Kirkby, their chief executive officer since 1957. "Kirkby, both individually and as chief officer of Johnson, intended to eliminate competition and dominate the market." *Langenderfer II*, 917 F.2d at 1443 (A60); *Langenderfer I*, 729 F.2d at 1054. The principal defendant companies are asphalt pavers S.E. Johnson, Ohio Engineering and Fred Creager & Sons, Inc.; Matco and OAMCO, which supply hot mix asphalt to the paving defendants; Maumee Stone, Michigan Stone and Wolcottville S&G, which supply stone and sand to Matco, OAMCO and the defendant pavers; and C.P. Calaway, a bridge building subsidiary of S.E. Johnson. Two months before the trial of *Langenderfer I*, defendants acquired Union Quarries Co., a fully integrated competitor, for $3.5 million cash. A year before the retrial in *Langenderfer II*, defendants acquired Allen County Aggregates and Dailey Asphalt for another $3.5 million cash (729 F.2d at 1053-54; JA 2044-47, 2102, 2197-2205; TR 2098-2101, 2156, 2251-59; PX3).

C. The Jury's Specific Findings

The unanimous jury found in answers to special interrogatories drafted by defendants that: defendants' thirteen acquisitions of asphalt pavers, quarries and sand pits "were all made to exclude and/or injure competition

and increase Johnson's power which he succeeded in doing"; the acquisitions enabled defendants to monopolize and attempt to monopolize Turnpike and ODOT asphalt paving work and the highway construction materials (asphalt, stone and sand) used therein in a thirteen county market in Northwestern Ohio where plaintiffs competed; defendants' monopoly power was willfully acquired, maintained or used through anticompetitive conduct in all the relevant markets pursuant to a specific intent to achieve a monopoly; and defendants' anticompetitive conduct injured all five plaintiffs in the aggregate sum of $2,475,000 actual damages (Ans. to Itgs. 1-18; A74-84). The trial court found on post-trial motions that the evidence was sufficient in all respects to sustain the jury's findings (A91).

D. The Asphalt Paving Industry in Northwestern Ohio

Limestone and sand are the principal ingredients of asphaltic concrete (asphalt, or hot mix) and essential to asphalt paving. A ton of asphaltic concrete consists of approximately 60% stone, 40% sand and 6% liquid asphalt (which evaporates in the mixing process at an asphalt plant). Limestone and sand are also used in the base (underlying) course of road building over which the surface course of hot mix asphalt is laid. Consequently, control of stone quarries, sand pits and asphalt plants is important to asphalt paving.

Highway asphalt paving work is administered and paid for by governmental bodies which invite competitive bids on specifications from paving contractors who are required to supply all the necessary highway construction materials (hot mix, stone and sand), labor and supervision at per-unit prices specified in the winning bid. The larger volume work is performed by prequalified contractors on Federal and State highway jobs which are closely specified and administered by the Ohio Department of Transportation ("ODOT") and the

Ohio Turnpike Commission ("OTC") with substantial use of Federal funds (JA 773, TR 202; 729 F.2d at 1052-53). The costs of the essential raw (stone and sand) and processed materials (hot mix) and of hauling them to the job site are the major expenses in performing these contracts. In order to minimize the expense, the paving contractor normally tries to buy his materials from the quarry or hot mix plant closest to the job site. The practical effective radius of a hot mix plant is about 25-30 miles because of the haul cost involved and the specified temperature at which the product must be delivered (JA 761, 1044, 1869-70; TR 190, 620, 1826-27; 729 F.2d at 1053). Defendants, through a series of acquisitions, now control seven quarries, two sand pits and fourteen hot mix plants strategically located throughout the area and are obviously the dominant factor in this regional industry (729 F.2d at 1052-53).

E. The Relevant Markets

The jury answered all seven special interrogatories drafted by the defendants on the issue of relevant markets in plaintiffs' favor. They found that the relevant product markets were Turnpike and ODOT asphalt paving contracts and the supply of stone, sand and asphalt used in performing the contracts (Ans. to Itgs. 1-7; A74-78). The trial court overruled defendants' motion *j.n.o.v.* on the relevant market issues (A94, n.3). Defendants stipulated the ODOT/OTC asphalt paving market in the thirteen counties in the *Langenderfer I* appeal. 729 F.2d at 1052-53. The Court of Appeals herein "conclude[d] that this thirteen-county ODOT/OTC asphalt paving market is established." 917 F.2d at 1440; A54.

F. Defendants Deliberately Obtained Monopoly Power Through Thirteen Anticompetitive Acquisitions

The jury, asked to describe one or more types of defendants' anticompetitive conduct, expressly found that "the acquisitions were all made to exclude and/or

injure competition and increase Johnson's power which he succeeded in doing" in the relevant markets (Ans. to Itg. 10; A81). The Court of Appeals found that "acquisitions by defendants of quarry sites coupled with the use of lengthy non-competition agreements and other circumstances did foreclose production and efficient use of such quarries and limestone by Langenderfer and others as competitors of defendants." 917 F.2d at 1443; A61. The evidence fully supported these conclusions. Starting in 1957, defendants deliberately engineered the thirteen acquisitions, on both a horizontal and vertical basis, of its major paving competitors and suppliers of limestone, sand and asphalt (JA 2081-2110, 2146-2213; TR 2135-64, 2200-67; 729 F.2d at 1053-54; PX 3).

1. Acquisitions of essential quarries, sand pits and bridge building capacity foreclosed competition.

The raw material acquisitions of quarries and sand pits gave defendants a captive supply of stone and sand for their own asphalt paving purposes and choice locations for placing asphalt plants, while becoming stone supplier to their asphalt paving competitors. 729 F.2d at 1054. Defendants sold stone and sand at high, rigid and non-competitive prices to their competitors who no longer could get discounts from the formerly independent quarries and sand pits (*e.g.*, JA 840-45; TR 269-74). After defendants' acquisition of bridge builder Calaway, it no longer did bridge work for, nor subcontracted paving to, plaintiffs and other asphalt paving competitors (JA 822, 2084-86, 2501; TR 251, 2138-40, 2615).

2. Acquisitions of asphalt paving competitors were anticompetitive and monopolistic.

In the face of a shrinking market (1969), defendants decided it was good business to acquire asphalt paving competitors to expand their market share by doubling capacity (JA 2156-58; TR 2210-12; PX 3). The

acquisitions were accompanied by non-compete agreements; were admittedly without business justification or need; were designed to prevent competitors' expansion; or were otherwise made to prevent competitors from price-cutting or competing (JA 2156-67; TR 2210-21).

In summary, defendants grew from two quarries and three hot-mix plants to seven quarries, fourteen hot mix plants and three sand pits serving Northwestern Ohio (729 F.2d at 1054; PX 3; JA 2077, 2192-93; TR 2131, 2246-47). Following defendants' acquisitions, established competitors avoided bidding against defendants, left the market altogether or went out of business (JA 1117, 1143, 1539-40, 1801-02, 1852, 2262-64; TR 743, 774, 1399-1400, 1748-49, 1809, 2315-17; PX 16). Plaintiffs' expert economists testified that defendants' anticompetitive acquisitions created a monopoly, eliminated actual competition, increased market concentration, prevented potential competition, raised entry barriers, foreclosed competition and enabled other anticompetitive conduct. This reflected a deliberate, calculated strategy that drove Langenderfer and NOAP out of the market, weakened remaining competition and inflicted plaintiffs' losses (JA 2640-2682, 2820-2875; TR 2874-2916, 3333-89).

G. Defendants' Market Shares and Statistical Evidence of Monopoly Power After the Acquisitions

After the acquisitions, defendants' market shares grew massively in Northwestern Ohio. They were the leading ODOT contractor in the entire state for over eighteen years (PX 37, 37A). Before the acquisitions, they bid less than 40% of the Northwestern Ohio market; afterwards they bid 80% to 100% of the market (PX 147A, 147S). Between 1972 and 1985, they averaged between 75.8% and 85% of all revenues on Turnpike work (PX 69, 69SA, 69B, 69C) and averaged 59% of all ODOT/OTC paving (PX 73A). Their share of asphalt tonnage rose from 40% in the 1970s to 48.3% in the 1980s (PX 30, 30A). In the 1970s and 1980s, defendants controlled half of the important Toledo area stone

market (PX 145, 145A). Defendants' pre-qualification bidding power[3] went from $13 Million in 1970 to $106 Million by 1986 (PX 68SB).

H. Defendants' Size and Power Dwarfed All Competitors

By 1985, defendants' *net worth* had grown to $35 million; all seven major competitors together had net worth of only $6.9 million (PX 110S). By 1985, defendants' *total assets* were over $47 million; all combined competitors had $16 million (PX 112S). By 1984, defendants' *sales* were 67% greater than the rest of competitors combined (JA 2549, TR 2669; PX 113A-114S). In the 1970s, defendants' *net profits* more than doubled; by 1984 they had doubled again (PX 115, 115A, 116A). In summary, defendants' twenty year history reflected phenomenal growth and massive economic power (PX 117A):

	Combined Defendant Companies ($000's omitted)					
	1965	1970	1975	1978	1985	Increase
Assets	5,668	11,374	19,089	25,320	47,154	732%
Net worth	4,222	9,117	15,865	21,495	35,270	735%
Total revenues	6,570	14,915	30,513	43,146	83,064	1164%
Profit before income taxes	934	2,163	2,969	4,319	5,866	528%

For the period 1979-84, defendants' cumulative net profit totalled $12.9 million; all seven competitors together equalled $637,000, and most competitors had severe losses (PX 116A). By 1984, defendants controlled 87% of the net worth among ODOT competitors; 71% of the assets; 64% of the sales dollars; and 91% of the net profit (PX 116B).

I. Abuses of Monopoly Power

There was direct evidence of defendants' intentional abuses and leveraging of monopoly power over the years toward many competitors. Defendant Kirkby told his

[3] The dollar amount of ODOT paving work an ODOT-qualified contractor could have in progress at any one time in a given year (*e.g.*, PX 68A-2).

Chairman of the Board that "in order to keep our position in the business we had to be dominant"; that he bid at "zero profit" against Miller and Langenderfer "to see just how tough the competition is"; that he hated competitors Miller and Langenderfer and would like to run them out of business. Kirkby warned plaintiff M&B to stay out of his "territory" and told Sader that "state work" belonged to Johnson and that Sader should not bid it (JA 1085-89, 1149, 1860-61, 2039-41, 2257-60; TR 685-89, 780, 1817-18, 2092-94, 2310-13).

In addition to the acquisitions, the trial court submitted six kinds of anticompetitive acts to the jury: (1) monopolistic stone pricing; (2) price or profit squeezing and cross-subsidization; (3) leveraging its position in ODOT and OTC; (4) tying the sale of stone and sand to the sale of asphalt; (5) intimidating, discouraging, coercing and retaliating against competitors; and (6) refusal to sell stone to Sader (JA 216). The trial court also submitted to the jury the issue of whether defendants' refusal to deal with Sader was for legitimate credit reasons or retaliation for testifying in *Langenderfer I* (JA 216-17, 219). The jury found for the plaintiff on all these matters. The evidence supported these claims and the trial court so found in denying defendants' *j.n.o.v.* motion (A91).

J. The Proceedings and Disposition Below

Plaintiffs Langenderfer and NOAP filed the original private antitrust action herein ("*Langenderfer I*") in 1976, alleging that defendants had violated Section 2 of the Sherman Act (15 U.S.C. §2) (JA 37-58). In March 1980, a unanimous jury of twelve returned a general verdict in favor of plaintiffs for actual damages of $982,117 (JA 59). District Judge Young denied defendants' post-trial motions, entered treble judgment for $2,946,351, ordered injunctive relief and awarded attorney's fees and costs. Both sides appealed (JA 81-105).

While the *Langenderfer I* appeal was pending, plaintiffs Langenderfer and NOAP were joined by new plaintiffs MacRitchie Materials, M&B and Sader in a companion suit filed on December 23, 1983 ("*Langenderfer II*"), for damages inflicted since 1980 by the continuing monopoly.

On March 15, 1984 the Sixth Circuit (Judges Wellford and Lively in the majority, Judge Wilhoit dissenting), while recognizing that the evidence supported plaintiffs' claims of monopolization, reversed, vacated the judgments and remanded *Langenderfer I* for a new trial. *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984).

Langenderfer I and *II* were consolidated in a seven-week jury trial before District Judge John W. Potter in August-September, 1986. The second unanimous jury returned general verdicts in favor of all five plaintiffs for actual damages aggregating $2,425,000, unanimously answering all of the 18 special interrogatories (including 60 subparts) in plaintiffs' favor (A74-84; JA 251-75). These interrogatories were in the form submitted by defendants. Judge Potter trebled the damages, awarded fees and costs, denied post-judgment interest to the *Langenderfer I* plaintiffs and ordered injunctive relief. He denied defendants' post-trial motions for *j.n.o.v.* or a new trial, finding the special interrogatory answers consistent with the general verdicts in all respects (A91). Appeal and cross-appeal to the Sixth Circuit followed.

The Court of Appeals entered its Opinion and Judgment on October 29, 1990 (A1-71). Plaintiffs' timely Petition for Rehearing and Rehearing *En Banc* was denied on January 23, 1991 (A122). The Court refused to stay its mandate on February 12, 1991 despite all parties requesting same. This is the second time petitioners Langenderfer and NOAP have sought a writ of certiorari in this Court.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Opinion Is An Implicit Extension Of *Matsushita* In Violation Of The Seventh Amendment.

The concerns vigorously expressed by the four dissenting Justices (White, Brennan, Blackmun and Stevens) in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 598-607 (1986) have come to full flower on the instant appeal. Here, the Sixth Circuit disregarded the jury's findings expressed in answers to special interrogatories and, through its own fact-finding exercise and "economic theorizing," overturned jury verdicts for the second time. The Sixth Circuit's opinion is an implicit extension of *Matsushita* in violation of the Seventh Amendment.

In *Matsushita*, a (5-4) majority of this Court held that, *on summary judgment*, an antitrust plaintiff must come forward with more persuasive proof than is ordinarily required "if the factual context renders [plaintiffs'] claim implausible—if the claim is one that simply makes no economic sense[.]" 475 U.S. at 587. The dissent was properly concerned that the *Matsushita* majority made "a number of assumptions that invade the factfinder's province," 475 U.S. at 599. The Sixth Circuit's review of the evidence herein went far beyond anything this Court condoned in *Matsushita*.

This is not a summary judgment case. Plaintiffs have passed the "plausibility" test time after time on motions for summary judgment, directed verdict, *j.n.o.v.*/new trial, and most importantly before a jury that returned answers to special interrogatories finding for the plaintiffs. Although it may not raise constitutional concerns for a court to find, at the summary judgment stage, that "the factual context renders [a] claim implausible," 475 U.S. at 587, such concerns are raised

where, as here, a jury, for the second time, has examined the facts and found the claims not only plausible, but *real*, based on *all* the evidence in a seven week trial.[4]

The Sixth Circuit's *sua sponte* finding that Langenderfer's damage claims "simply fail to reflect economic reality and we shall make adjustments accordingly," (917 F.2d at 1444; A62) is the illegitimate offspring of *Matsushita*. It baldly illustrates the extent to which the Court went to impose its own views of economic reality on a case where the factfinder had already fulfilled its constitutional role. Instead of reviewing the sufficiency of the evidence in the light most favorable to plaintiffs, as it was required to do, the Court felt free to weigh the plausibility of plaintiffs' evidence, compare it with defendants' evidence, and make its own judgments about economic impact despite the jury's findings to the contrary. Where a jury has examined and found the facts, however, a reviewing court has no business considering plausibility. Simply put—does the Seventh Amendment permit a Court of Appeals to overturn a jury's express findings, based on that Court's vision of "economic reality"? As hereinafter discussed, the answer must be a resounding: "No."

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[4] "*Matsushita* authorizes an inquiry on summary judgment into the 'implausibility' of inferences from circumstantial evidence, particularly in antitrust conspiracy cases, not an inquiry into the credibility of direct evidence." *McLaughlin v. Liu*, 849 F.2d 1205, 1207 (9th Cir. 1988). *See also* DeSanti & Kovacic, "*Matsushita*: Its Construction and Application By The Lower Courts," 59 *Antitrust Law Journal* 609, 628, 634, 641-43 (1990) ("Lower court opinions reflect the tension between the majority and minority opinions in *Matsushita* concerning the extent to which a court must 'weigh' evidence and therefore invade the province of the factfinder . . ."); Stempel, "A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process," 49 O.S.L.J. 95, 164-68 (1988) ("When the nature of . . . (by extension judgment *n.o.v.*) practice is changed, however, so that it involves a judicial assessment of the correctness of competing questions of fact existence and fact inference, the rock on which these cases (*e.g.*, *Matsushita*) was built begins to crumble . . . it would seem that these new . . . ground rules violate the Seventh Amendment.")

There can be no question that the Sixth Circuit construed the facts in this case in disregard of the jury's findings, scorning its own rules:

> The Appellate Court must be governed by the rules safeguarding the constitutional right of trial by jury, which requires the Appellate Court to take the strongest legitimate view of all the evidence to uphold the verdict; to assume the truth of all that tends to support it, *to discard all to the contrary,* and to allow all reasonable inferences to sustain the verdict.

Smith v. Illinois Central Railroad Co., 394 F.2d 254, 256-57 (6th Cir. 1968). The jury may not have believed a word defendants' witnesses said, as the Court instructed was their right (JA 203). For the Sixth Circuit to credit any of defendants' witnesses was the plainest invasion of the jury's factfinding responsibilities.

The Court of Appeals utterly failed to consider the case as a whole. It studied each of the five plaintiffs, issues and markets independently in a vacuum, as though one had nothing to do with the other. It failed to consider the overall impact of defendants' monopoly and all plaintiffs' proof contrary to the trial court's charge (JA 204). As stated in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962):

> It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.

These principles were reaffirmed in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 599 (1985) but the Sixth Circuit steadfastly ignored them in the appeal at issue.[5]

In short, the principal reason for granting the writ in this fifteen year old case is to protect the constitutional right to trial by jury and preserve the integrity of the appellate process. The *Langenderfer II* Court of Appeals trampled on the unanimous jury findings and disregarded traditional concepts of appellate procedure—a precedent, which if allowed to stand, will hereafter plague the course of innumerable appeals and judicial supervision of jury verdicts. The Court of Appeals literally "... has so far departed from the accepted course of judicial proceedings ... as to call for an exercise of [the Supreme] Court's power of supervision" (S.Ct. R.10.1(a)). Plaintiffs have no other remedy for the fundamental violation of their Constitutional rights by a Court of Appeals than review by this Court.

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[5] The trial court herein submitted six specific categories of defendants' anticompetitive conduct to the jury and found them supported by the evidence in its post trial rulings (JA 216; A91). The Sixth Circuit, however, treated each one separately for each of plaintiffs' claims and found that the plaintiffs had failed to prove monopolistic stone pricing, price squeezing and tying in various respects. This was contrary to the teaching of *Aspen* where the Tenth Circuit had held:

> Plaintiff's evidence should be viewed as a whole. Each of the six things [alleged anticompetitive acts] viewed in isolation need not be supported by sufficient evidence to amount to a §2 violation. It is enough that taken together they are sufficient to prove the monopolization claim. *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1522, n.18 (10th Cir. 1984), aff'd 472 U.S. 585, 599 (1985).

II. The Seventh Amendment Precluded The Court Of Appeals From *Sua Sponte* Reviewing Any Issues Of Langenderfer's Damages Or Indirect Injury To NOAP. The Issues Were Never Raised By Motion Below; They Were Never Assigned As Error, Briefed Or Argued On Appeal.

The appellate court *sua sponte* disregarded unanimous jury damage verdicts and ridiculed plaintiffs' proofs. It then waded into the record and redetermined damages to suit itself and cut Langenderfer's award by two-thirds, stating "that some of the dollar figures offered by plaintiffs and their experts simply fail to reflect economic reality and we shall make adjustments accordingly" (917 F.2d at 1444; A62). A new day has dawned, if Courts of Appeals can now fix the amount of damages in jury cases. "It is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, ____, 109 S. Ct. 2909, 2921 (1989). The Court candidly set out to re-do the jury's job: to evaluate the alternate methods of proof, to sift and weigh the evidence, to draw inferences, to judge credibility, and to decide what was reasonable under all the circumstances after making its own "realistic allocations," 917 F.2d at 1444-47; A61-66.

A. The Court of Appeals effectively directed a damage verdict for a reduced sum.

Under the Seventh Amendment, no appellate court has the power to redetermine damages.[6] "The Seventh Amendment reserves the determination of damages, in jury trials within its scope, to the jury." *McKinnon v.*

[6] The Supreme Court only recently noted that "we have never held expressly that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive" although it has twice granted certiorari to consider the issue but never reached it. *Browning-Ferris*, 109 S. Ct. at 2922, n.25. Certainly the time is ripe for review of this issue, especially when the defendants never attacked the excessiveness of the verdict, by motion below or on appeal.

City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1984). There is no point in having juries at all if appellate courts can *sua sponte* disregard their findings of fact and usurp the jury's unique function in fixing damages. A United States Court of Appeals has no jurisdiction to re-examine facts tried to a jury. *Parsons v. Bedford*, 28 U.S. 433, 446-48 (1830); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Limited*, 369 U.S. 355, 363-64 (1962). The Court of Appeals did not even have the right to review the trial court's denial of a new trial on damage issues absent a clear showing of abuse of discretion, which was never raised. In *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933), it was stated:

> The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or inadequate. The rule precludes likewise a review of such action by a circuit court of appeals.

What this appellate Court did is the equivalent of directing a verdict in a reduced sum for the plaintiff Langenderfer. The Court of Appeals cannot direct a verdict in a jury case in view of the Seventh Amendment prohibitions. *See, Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 392-94 (1937); *Young v. Central Railroad Co.*, 232 U.S. 602, 603-604 (1914). The Court of Appeals had no power to vacate or reduce the aggregate judgment for Langenderfer and NOAP. This Court should correct such a flagrant disregard of the Seventh Amendment as an admonition to those courts that might be tempted to stray from Constitutional orthodoxy. We submit that the Court of Appeals' conduct is so far outside the accepted confines of the Seventh Amendment and appellate procedure that its rulings overturning damage verdicts should be summarily vacated and judgments of $1,675,000 for Langenderfer and NOAP reinstated. S.Ct. Rule 16.1.

B. The Sixth Circuit's review likewise deprived petitioners of appellate due process.

The Court's bold usurpation of the jury's unique role is all the more astonishing because defendants did not move for directed verdicts, *j.n.o.v.*, or new trial on the issue of damage amounts or NOAP's standing (JA 2901-48, 3721-3752; JA 283-86) and never presented, briefed or argued those non-issues as error on the appeal. See, Defendants' "Issues Presented" (A126-27). Consequently, plaintiffs never even had a chance to argue or defend against the Court of Appeals' gratuitous and startling findings. In similar vein, the Court of Appeals held (917 F.2d at 1437-38; A47-50) that plaintiff NOAP had only been indirectly injured under the standing doctrine of *Associated General Contractors of California, Inc. v. Carpenters*, 459 U.S. 519, 538-40 (1983) and could not recover antitrust damages under Clayton §4, even though the defendants had never raised NOAP's standing as a defense at trial or by motion, and never presented or argued it on appeal.[7] Once again, plaintiffs had no chance to argue the issue. This kind of appellate conduct is shocking and should be "nipped in the bud," lest other courts find its exercise tempting.

The common law proscription referred to in the Seventh Amendment limits appellate review to issues properly raised below or on appeal. Defendants repeatedly waived these issues and the Court of Appeals violated traditional standards of appellate due process and the limited scope of review (including its own) in even considering such issues.

> It is the general rule, of course, that *a federal appellate court does not consider an issue not passed upon below.* In *Hormel v. Helvering*, 312 U.S. 552,

[7] Defendants waived NOAP's standing years ago in *Langenderfer I* and never raised it on retrial. In fact, in the special interrogatories and general verdict forms drafted by defendants, they combined Langenderfer and NOAP and treated them as *one* party for findings and verdict purposes (Ans. to Itgs. 1-7, 12, 17, 18; A75-78, 81, 83, 84).

> 556 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] *in order that litigants may not be surprised on appeal* by final decision there of issues upon which they have had no opportunity to introduce evidence." We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute.

Singleton v. Wulff, 428 U.S. 106, 121 (1976).

"The clear rule is that appellate courts do not consider issues not presented to the district court." *Brown v. Marshall*, 704 F.2d 333, 334 (6th Cir.) (*per curiam*), *cert. denied*, 464 U.S. 835 (1983). The appellate court will not review issues not specifically preserved by motions for a directed verdict, *j.n.o.v.* or new trial. 9 C. Wright & Miller, Fed. Prac. & Proc. §2536, p. 593 (1971).

In the case at hand, not only did defendants fail to raise the subject issues of damages and NOAP's standing at the trial but they failed to present or argue them in the Sixth Circuit appeal. *See*, Defendants-Appellants' Issues Presented (A126). "[A]n [appellant's] original brief abandons all points not mentioned therein," *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales*, 729 F.2d 1530, 1539 n.14 (5th Cir. 1984); *Priddy v. Edelman*, 883 F.2d 438, 446 (6th Cir. 1989).[8]

[8] The Sixth Circuit has declined to decide an issue even where the parties had briefed the issue because it had not been "specifically" appealed. *Chiropractic Cooperative Ass'n of Michigan v. American Medical Ass'n*, 867 F.2d 270, 277 (6th Cir. 1989). Recently, this Court has declined to address an argument because the defendant failed to raise it properly in the district court or on appeal. *Browning-Ferris, supra*, 109 S. Ct. at 2921.

The issues were never before the appellate court. The court's gratuitous reversal of jury awards in these circumstances violates cardinal principles limiting the scope of review to issues properly raised and argued. If courts of appeals can ignore their own rules and *sua sponte* overturn jury verdicts at will, the Seventh Amendment has become a dead letter.

III. The Appellate Court Again Violated The Seventh Amendment When It Re-Examined The Jury's Relevant Market Findings. Defendants' Monopolization Of ODOT/OTC Asphalt Paving And Materials Used Therein As Found By The Jury Is Sufficient To Sustain The Claims Of All The Plaintiffs.

The Court of Appeals decision raises important issues of antitrust law in the process of contravening the jury's findings of fact. Perhaps the most important is that, although the Court of Appeals affirmed, as to plaintiff Langenderfer, the jury's finding that defendants monopolized and attempted to monopolize a contiguous thirteen county area in Northwestern Ohio (917 F.2d at 1440; A54), it rejected that same finding when it reversed awards to two other plaintiffs (M&B and Sader) *who competed against defendants within the same thirteen counties* on the grounds they did not each prove separate relevant geographical markets as to the lesser included counties.[9] In short, the Court of Appeals ignored the "economic reality" that the total includes the sum of its parts, contrary to *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966) which held:

[9] The trial court properly instructed the jury on the relevant thirteen county market *and submarkets* within it (JA 209-211). It was defendants who concocted a confusing interrogatory asking the jury to "state the relevant market *or* submarket of each plaintiff." Thus, the jury may very well have found submarkets for each plaintiff. The jury's answers to special interrogatories must be reconciled if at all possible with the general verdicts (as the trial court did) when "there is a view of the case that makes the jury answers to special interrogatories consistent." *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 119 (1963). The Court of Appeals flatly ignored that principle.

> . . . the relevant market for determining whether the defendants have monopoly power is not the several local areas which the individual stations serve, but the broader national market that reflects the reality of the way in which they built and conduct their business.

The rejection of this principle will have far-reaching consequences and affect the trial of many antitrust cases for years to come wherever relevant market issues and multiple plaintiffs are involved.

The appellate court also ignored the anticompetitive leverage that defendants' thirteen county monopoly exerted over the individual counties within the thirteen. As the Sixth Circuit itself stated in *Kerasotes Michigan Theatres, Inc. v. National Amusement, Inc.*, 854 F.2d 135, 137 (6th Cir. 1988):

> To run afoul of the antitrust laws, it is not necessary that the party attempting to leverage its monopoly power from a given market [the 13 counties] into a second market [a cluster of counties within the 13] possesses monopoly power or dominant market position in that second market. . . We expressly reject the district court's reasoning that leveraging or the abuse of monopoly power is not actionable when the offender has not yet acquired a dominant position in the affected market.

Since the relevant geographical market was the only issue defendants successfully appealed against M&B, if this ruling is reversed, M&B's actual damages of $350,000 should be reinstated.

Finally, the Court of Appeals ignored the jury's explicit findings that defendants monopolized and attempted to monopolize the raw materials (stone, sand and asphalt) *that went into* (called "inputs") asphalt paving of Turnpike and ODOT jobs,[10] and instead, held

[10] The jury's finding that defendants monopolized the "inputs" is fully supported by the landmark case of *Standard Oil Co. v. United States*, 221 U.S. 1, 77 (1911):

(Footnote continued on following page.)

that plaintiffs were required to prove that defendants monopolized or attempted to monopolize the *production* of all stone and sand in the thirteen counties *whether or not used in OTC/ODOT work*. The jury did not find that defendants monopolized the *production* of all stone, sand and asphalt but only that which was *used in* OTC/ODOT paving contracts as plaintiffs had claimed (Ans. to Itg. 9; A80). Consequently, the Sixth Circuit overturned the result below on a *non-sequitur*—a finding that the jury did not even make! That is "point blank" re-examination of the evidence in disregard of the jury's fact-finding prerogative and it changed the whole outcome of the case. A court of appeals is supposed to determine if there is evidence to support the jury's findings—not determine whether there is evidence to support a finding *they did not make*.

IV. The Court Of Appeals Again Re-Examined The Jury's Findings In Reversing Sader's Judgment. Sader Was Cut Off By The Monopolist Under A Sham Credit Pretext; It Was A Jury Issue.

Defendants have had the only quarry and asphalt plant at Bowling Green (Portage) for the last 25 years after they acquired their only competitor in the area (JA 1133-38, 2092-93; TR 764-69, 2146-47; PX 1, 3). As the evidence proved, the jury found, and the trial court held in its post-trial rulings, defendants controlled an "indispensable facility which cannot be easily

(Footnote continued from preceding page.)

> The inference that no attempt to monopolize could have been intended, and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other . . . .

Since defendants monopolized ODOT and Turnpike paving, they supplied the "inputs" from their own seven quarries or fourteen asphalt plants, thereby foreclosing the plaintiffs from supplying *any* materials on those jobs.

duplicated.' " (A95; JA 515). As Sader testified, and defendants admitted, Sader had to buy stone and asphalt from defendants at Portage in order to compete against defendants' paving operation (JA 1138-42, 2213-15; TR 769-73, 2267-69). By the time Sader hauled stone or asphalt the 30 extra miles round trip from other quarries or plants, he could not compete effectively with defendants who had cut off his local supply although he did not owe them "a penny" (JA 1171-72; TR 802-03).

Sader did not have to prove production market shares of stone and asphalt at Bowling Green, as the appellate court held. Defendants were the *only* producer (within 30 miles round trip); therefore, they produced 100% of all highway construction materials produced in that area which Sader needed to compete with defendants. The relevant market was self-defining.[11] Documented statistical expert or market share data evidence is not necessary if the impression from the evidence as a whole is one of dominance. *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 806 (8th Cir. 1987).

> Although relevant geographic markets are not "susceptible to a (precise) metes and bounds" definition, "the appropriate market is characterized as the area in which the seller operates and to which the purchaser can practically turn for supplies." *United States Steel Corporation v. FTC*, 426 F.2d 592, 596 (6th Cir. 1970), *citing Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 331 (1961).

It obviously was not practical for Sader to haul stone and asphalt an extra 30 miles if he wanted to compete with defendants' paving operations. The jury was justified in finding defendants' dominance in the Bowling

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[11] This Court's recent decision in *FTC v. Superior Court Trial Lawyers Association*, _____ U.S. _____, 110 S. Ct. 763, 781, n.18 (1990) acknowledged that "the fact of agreement defines the market." Here, too, the undisputed fact of defendants' control of an indispensable facility defines the defendant-controlled market in which Sader was injured.

Green area through its control of an essential facility. The Court of Appeals had no business second-guessing that finding as it once again did.

The true Sader issue, as the Court of Appeals recognized (917 F.2d at 1425; A22), was whether defendants terminated Sader for legitimate credit reasons or in retaliation against him for testifying in *Langenderfer I* and to hurt him competitively. The credibility and demeanor of witnesses, the pattern of events and the good or bad faith of the defendants' employees in using credit as a disguise for their anticompetitive conduct was peculiarly a jury issue, as the trial court found (A94-95). Defendants' oppressive credit tactics (which the Court of Appeals naively accepted at face value as "commercial and credit controversies . . . not aris[ing] in an antitrust context," 917 F.2d at 1426; A 23-24) were a smoke screen to cover up the animus the jury found.

We do not see how the Sixth Circuit can be "persuaded" that Sader's claim has "arguable merit" (917 F.2d at 1425; A22) and then hold it was not a jury question. The only way it could reach its legal conclusion is by weighing the evidence which was the jury's sole prerogative under the Seventh Amendment. This it was not permitted to do. Sader's actual damages of $250,000 should be reinstated and affirmed.

V. The Court's Refusal To Award Attorneys' Fees Or Costs To The Prevailing Plaintiff For The First Nine Years Of This Case Is Contrary To Law, Unconscionable On Its Face And Exhibits Hostility To Private Enforcement Of The Antitrust Laws.

The Court of Appeals affirmed the trial court's refusal to award any attorneys' fees and costs to the successful antitrust plaintiff, Langenderfer, for the first nine years of its fifteen years of legal effort in

Langenderfer I. This demonstrates a patent hostility to the private enforcement of the antitrust laws that this Court should not countenance and is squarely opposed to the Congressional intent in enacting Clayton §4.[12]

Under the Court's holding, the one successful antitrust plaintiff, Langenderfer, who has prosecuted a bitterly-fought case against an entrenched monopolist over fifteen years, cannot even recover fees for drafting the original complaint and the filing fee it paid when it commenced action in 1976. All the discovery efforts and legal proceedings in *Langenderfer I* that contributed to the ultimately successful result go unreimbursed. This is an outrageous holding—compelling this Court's supervisory review of such a precedent. The trial court's holding that as a matter of law claims in *Langenderfer I* and *Langenderfer II* were "distinct in all respects" (684 F. Supp. at 957) is fatuous by any standard. The trial court itself had consolidated the two cases for trial because they had common questions of law and fact respecting defendants' monopolization through acquisitions in violation of Sherman §2. This decision standing alone is precedent busting and should be summarily reversed. It makes a laughingstock of this Court's attorney fee decisions, including *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983), on which it purports to rely. As *Hensley* stated:

> In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. *Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court shall focus on the significance of the overall relief obtained* by the plaintiff in relation to the hours reasonably expended on the litigation.

* * *

[12] "Private enforcement of the Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition." *California v. American Stores Co.*, 110 S. Ct. 1853, 1860 (1990).

> . . . [T]he fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

The trial court's refusal to award any fees or costs for the first nine years of legal effort in this case, now affirmed by the Sixth Circuit, manifests an antipathy to the private enforcement of the antitrust laws in direct violation of the Congressional intent and a defiance of this Court's clear command in *Hensley*. The holding will plague attorney fee and cost issues in fee-shifting cases for years to come. Such a shocking precedent should not be allowed to stand without the Court's closest scrutiny.

VI. Refusal To Allow Postjudgment Interest On The Original *Langenderfer I* Judgment Reinstated By The *Langenderfer II* Judgment Is Contrary To Binding Precedents In The Sixth Circuit And Presents A Direct Conflict With The Eighth And Ninth Circuits.

The Sixth Circuit's affirmance of the trial court's refusal to allow postjudgment interest on the amount of the original *Langenderfer I* judgment dating from 1980 (917 F.2d at 1447; A69) conflicts with decisions in the Eighth and Ninth Circuits. *H&J, Inc. v. International Tel. & Tel. Corp.*, 1991-1 CCH Trade Cases ¶69,327 at 65,264 (8th Cir. 1991); and *Handgards v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985). It is also squarely opposed to the principles recently enunciated by the Sixth Circuit itself in *Bailey v. Chattem, Inc.*, 838 F.2d 149, 154 (6th Cir.), *cert. denied*, 486 U.S. 1059 (1988), where it held:

> [T]hat when the measurement of damages found by a second, properly instructed jury includes within it a lesser amount of damages which was also found by

> the jury in the first trial, considerations of equity lead us to run interest on that lesser amount from the date of the first judgment.

In applying the "equity of the statute approach," which the Court of Appeals rejected below, *Bailey* embraced the reasoning of the Ninth Circuit in *Handgards, supra*, a private antitrust case procedurally identical to the instant case. *Bailey*, 838 F.2d at 154.

This Court's recent decision in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, ___ U.S. ___, 110 S. Ct. 1570 (1990), does not directly address the issue in question. It is, nevertheless, an important issue, certain to recur when any cases are retried and the same or larger judgments are awarded on retrial. Because the Court of Appeals did not discuss its own binding precedents, petitioners are at a loss to construe or even understand why the Sixth Circuit disregarded *Bailey*. Post-judgment interest on Langenderfer's original judgment should have been granted. This decision presents an irreconcilable conflict with the Eighth and Ninth Circuit decisions cited above. This Court's review is essential to resolve the conflict among Circuits and provide a helpful guide to inferior courts where retrials frequently occur and the same or larger judgments are obtained.

CONCLUSION

Many parties complain before the Supreme Court that they have not had a fair trial. Here, the petitioners complain that they have not had a fair hearing on appeal—twice. The same two appellate judges that reversed the unanimous jury verdict in *Langenderfer I* formed the majority which reversed the jury verdicts again in *Langenderfer II*. This time they created new arguments that had never been raised and ignored the jury's explicit findings—but the result was substantially the same.[13] This Court of Appeals decision, in re-retrying the facts *de novo*, represents an unprecedented invasion of the jury's province and a flagrant disregard of the scope of limited review binding appellate courts. This Honorable Court should review this result or it will be cited for years to come as precedent to ignore the Seventh Amendment and well-accepted standards of appellate review.

There is no question that the Sixth Circuit rewrote the facts the jury had found. Its seventy-one page opinion is *prima facie* evidence of that fact if any is needed. In doing so, it took the strongest view of the *defendants'* evidence and assumed the truth thereof, discarded or paid mere lip service to plaintiffs' evidence, and reached every possible inference and factual conclusion to overturn, rather than uphold, the jury's verdicts.

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[13] The irony of the Court of Appeals' conduct is striking. In *Langenderfer I*, the same two judges reversed the jury verdicts and ordered a retrial because without answers to interrogatories they could "... not discern whether the jury verdict was based on legally insufficient proof of predatory pricing or on the other allegations of anticompetitive acts." 729 F.2d at 1058. Now, in *Langenderfer II*, 917 F.2d 1413 (A1), when the jury answered eighteen special interrogatories (and 60 subparts) in plaintiffs' favor supporting every element of the case, the same Court brushed them aside in its own re-examination of the evidence and did not credit those answers anyway.

We believe, however, that, in the exercise of its supervisory responsibility over the courts of appeals, the integrity of the jury system is of such consummate importance to the Supreme Court that it will not allow an opinion to stand that wasted the services and findings of two unanimous juries and two different trial judges, misconstrued the facts and misapplied the law, considered issues not properly before it and deprived these petitioners of their constitutional rights after they have acted as private attorneys general at great personal sacrifice over many years. To award no fees or costs for nine years of legal effort is the ultimate injustice. Petitioners respectfully request that this Honorable Court grant this Petition for Certiorari to safeguard petitioners' constitutional rights for themselves and for all those future parties whose rights are seriously threatened by the unreviewed decision of the Court of Appeals. We believe the Court's decision is so contrary to elementary principles on its face that it warrants the extraordinary remedy of summary reversal and reinstatement of judgments for all the petitioners.

April 11, 1991

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Dated October 29, 1990)

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

Nos.
87-3543/3577/3881/3882/88-3126/3127/3574/3651

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ARTHUR S. LANGENDERFER, INC.; NORTHERN OHIO ASPHALT PAVING CO.; MACRITCHIE MATERIALS, INC.; M & B ASPHALT CO., INC. and G.M. SADER EXCAVATING & PAVING, INC.,

Plaintiffs-Appellees, Cross-Appellants,

v.

S.E. JOHNSON CO.; OHIO ENGINEERING CO.; PRICE BROTHERS, INC.; FRED CREAGER & SONS, INC.; MATCO ASPHALTIC CONCRETE PRODUCTS CO.; OAMCO; C.P. CALAWAY, INC.; MAUMEE STONE CO.; MICHIGAN STONE CO.; WOLCOTTVILLE SAND & GRAVEL CORP.; STONECO, INC.; SAXTON DEVELOPMENT CO. and J. T. KIRBY,

Defendants-Appellants, Cross-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed October 29, 1990

Before: MARTIN and WELLFORD, Circuit Judges; and LIVELY, Senior Circuit Judge.

WELLFORD, Circuit Judge. The parties in this antitrust controversy are, or were at one time, involved in businesses related to road and highway construction in northwestern Ohio. Plaintiff Arthur S. Langenderfer, Inc. (Langenderfer) was an asphalt paving contractor that ceased operations in 1978, allegedly due to defendants' antitrust violations. Northern Ohio Asphalt Paving Co. (NOAP), a sister company of Langenderfer, is an asphalt producer. Langenderfer and NOAP were the original plaintiffs in a related case, *Langenderfer v. S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984) (*Langenderfer I*), a case in which this court vacated judgment based on a verdict in favor of plaintiffs and remanded for a new trial.

I. *GENERAL BACKGROUND*

While the *Langenderfer I* appeal was pending, the original plaintiffs were joined by other plaintiffs in a companion case, and when *Langenderfer I* was decided and a remand effectuated, the separate actions were consolidated. One of the "new" plaintiffs is MacRitchie Materials, Inc. (MacRitchie), a limestone supplier and sister company of Langenderfer and NOAP that was denied leave to intervene in *Langenderfer I*. *See* 729 F.2d at 1060. The other new plaintiffs are M&B Asphalt Co., Inc. (M&B), an asphalt producer, paving contractor, and limestone quarry operator, and G.M. Sader Excavating & Paving Co., Inc. (Sader), an asphalt paving and excavating contractor. The defendant companies (which shall be referred to collectively as "Johnson") are commonly owned, and are involved in various aspects of the road construction business. Defendant John T. Kirkby is the president of Johnson and chief executive officer of the Johnson entities.

In the *Langenderfer I* trial, plaintiffs relied largely on evidence of alleged predatory pricing in bidding on public road projects. Plaintiff introduced no evidence to indicate that defendants' bids were less than defendants' total average costs, and we held that the trial court did not instruct the jury properly on the legal standard for a predatory pricing antitrust violation. Because the predatory pricing claim could not stand separately as a matter of law, and because it was unclear whether the jury verdict was based on predatory pricing or on other alleged anticompetitive behavior, we vacated the judgment in favor of plaintiffs in *Langenderfer I*, and remanded for a new trial. We noted that in order to prevail on a claim of monopolization or attempt to monopolize, plaintiff must "establish that Johnson engaged in some type of prohibited anticompetitive conduct." 729 F.2d at 1054-55.

Plaintiffs in the current action allege that the defendants violated § 2 of the Sherman Act by monopolizing and attempting to monopolize "the production and supply of highway construction materials and in the bidding, construction and repair of asphalt highways" in a thirteen-county area of northwest Ohio. These highway projects were administered on a competitive bidding basis by the Ohio Department of Transportation (ODOT) and/or the Ohio Turnpike Commission (OTC). Defendants assert once again in defense of the charges that Johnson's success relative to the plaintiffs was the result of better foresight and management, which led to diversification, improved efficiency, and lower costs.

The allegations of plaintiff Sader differed significantly from those of the other plaintiffs, because Sader was not an actual competitor in ODOT/OTC work. Instead, Sader did mostly private paving work, but alleged that it relied on Johnson for raw materials, and that Johnson terminated Sader's credit in retaliation for the testimony of Sader's president, Gregory Sader, in *Langenderfer I*. Johnson maintained, on the other hand, that the credit cut-off was for legitimate business rea-

sons. We shall deal with the claims of each of the plaintiffs independently.

The jury made the following findings, after submission of special interrogatories:

1. As to all plaintiffs except Sader, relevant product markets included limestone, sand, and asphalt used in ODOT and OTC paving contracts, as well as the ODOT and OTC paving contracts themselves.

2. The relevant geographic market for *all* plaintiffs was the thirteen-county area.

3. Defendants possessed monopoly power, defined as "the power to control prices or exclude competition," in all of the relevant product markets, and that power was willfully acquired, maintained, or used through anticompetitive conduct. Asked to describe one or more types of anticompetitive conduct, the jury replied, "The acquisitions were all made to exclude and/or injure competition and increase Johnson's power which he succeeded in doing."[1]

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[1]The jury instructions listed the following six alleged anticompetitive acts:

1. Monopolistic stone pricing;
2. Price or profit squeezing and cross-subsidization;
3. Leveraging its position in ODOT and OTC;
4. Tying the sale of stone and sand to the sale of asphalt;
5. Intimidating, discouraging, coercing and retaliating against competitors;
6. Refusal to sell stone to Sader.

Defendants assert that because the jury's above-reflected response to the interrogatory did not list any of these six alleged anticompetitive acts, its findings were not consistent with a violation of the antitrust laws. The trial court found, however, that the jury's response to this "one or more" question was not inconsistent with the general verdict.

4. Defendants' monopolization caused injury to all of the plaintiffs (including Sader).

5. Defendants possessed the specific intent to achieve a monopoly in all of the relevant markets, engaged in anticompetitive conduct toward that end, and there was a dangerous probability that they would achieve a monopoly.

6. Defendants' attempt to monopolize caused injury to all of the plaintiffs (including Sader).

7. Damages (before trebling) were $1,675,000 for Langenderfer and NOAP; $200,000 for MacRitchie; $350,000 for M&B; and $250,000 for Sader.

The trial court entered judgment in accord with the verdict, trebling the damages found by the jury, and allowing payment of interest at the annual rate of 5.79 percent until paid.

On appeal, defendants contend that as a matter of law, no monopoly power may be found in the supply of sand, limestone, asphalt, or in bidding and performance of state and turnpike jobs.

In addition, defendants maintain that plaintiffs failed to support allegations of anticompetitive conduct, relying instead on evidence of Johnson's above-cost bids, contrary to the holding of *Langenderfer I*. In addition, Johnson asserts that the thirteen-county area cannot represent the relevant market for M&B, which performs most of its work in only two counties and has never actually worked in the majority of the thirteen counties found to be the relevant market. Johnson makes a similar contention as to Sader. As an affirmative defense, Johnson claims that MacRitchie lacks antitrust standing, and that Sader may not recover under § 2 of the Sherman Act based on Johnson's revocation of Sader's credit privileges.

The original Johnson Company was founded in 1929 by Sherman Johnson, who died in 1956. The company then

owned three stone quarries and three hot-mix plants, and was the largest asphalt paving contractor in northwest Ohio. Following Mr. Johnson's death, defendant Kirkby became the principal operating officer in 1957. At that time, plaintiff Langenderfer was the second largest asphalt paver in the area. Beginning in 1961, Kirkby, as principal officer on behalf of defendants, embarked on a series of acquisitions, described by this court in *Langenderfer I.* 729 F.2d at 1053-54.

We vacated and remanded the first judgment because the proper legal standards were not applied, particularly as to predatory pricing. We stated, however, that there was "[s]ubstantial evidence indicat[ing] that Kirkby, both individually and as chief officer of Johnson, intended to eliminate competition and dominate the market." *Langenderfer I* at 1054. Furthermore, in the first appeal, we noted that there was expert testimony by economists to the effect that Johnson's acquisitions created "significantly increased market concentration," and therefore had a tendency to create a "monopolistic market structure." *Id.* at 1054.

After remand by this court, plaintiffs amended their complaint asserting that Langenderfer was a general paving contractor until "forced out of business by the defendants[2] in 1978." NOAP asserted that it was in the business of purchasing sand and stone, mixing these at asphalt plants, and selling the resulting materials to Langenderfer, asphalt pavers, and others. These plaintiffs asserted that Johnson, Ohio Engineering, and Creager were competitors in constructing and repairing highways and roads in northwestern Ohio with Langenderfer, and that "business is generally performed . . .

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[2]Defendants named were the Johnson companies, Ohio Engineering Co. (Ohio), Fred R. Creager & Sons, Inc. (Creager), Matco Asphaltic Concrete Producing Co. (Matco), OAMCO, Inc. (OAMCO), C.P. Calaway, Inc. (Calaway), Maumee Stone Co. (Maumee), Michigan Stone Co. (MSC), Wolcottville Sand & Gravel Corp. (WAS&G), Saxon Development Co. (Saxon), Stoneco, Inc. (Stoneco), and J.T. Kirkby.

after competitive bidding by the governmental authorities." Langenderfer alleged that it "customarily carried on its procurement of materials through plaintiff NOAP." Plaintiffs averred that to minimize costs, "the paving contractor normally purchases highway construction materials for the quarry or asphalt plant located closest to the job site."

Defendants were charged with "unlawfully combining in restraint of interstate trade and conspiring to monopolize and attempt to monopolize . . . in the production and supply of highway construction materials and in the bidding, construction and repair of asphalt highways." In addition, plaintiffs charged that defendants quoted and charged them higher prices for stone, sand, or asphalt than those charged to defendant paving contractors. They also charged defendants with refusing to sell these materials, tying sales of stone and sand to asphalt, and other "predatory" practices, including forcing competitors out of the sand, stone, and asphalt business by these practices, all done with requisite anticompetitive intent.

Defendants denied the charges of unlawful anticompetitive conduct and averred that a corporate restructuring took place in 1986 leaving S.E. Jason Companies, Inc. as the only active Johnson entity with wholly owned subsidiaries Creager, Stoneco (formerly Oamco, Inc.), and Alloy Founders.[3]

A basic issue in the retrial of this case arose in defendants' motion to exclude evidence of alleged predatory bidding by

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[3]Defendants also responded that Ohio & Metro "no longer exist," and that Calaway "is currently an inactive corporation" (as of July 1986). Johnson answered that Maumee & MSC merged into it; that WAS&G "operated a sandpit in Indiana and became inactive and is now inactive, but that WAS&G's assets, after reactivation, were transferred into Stoneco." Defendants further answered that Saxon "is inactive and has no current business activities." Kirkby was alleged, in the answer, to have owned less than a five percent interest in Johnson at all relevant times.

reason of our holding in *Langenderfer I.* The district court agreed with plaintiffs and held bidding practices admissible because such practices may "portray the effects of defendants' long term monopolization of this market."[4] Even if some of the evidentiary emphasis in the second trial was on the asserted predatory bidding practices of defendants, and this is a separate charge from monopolization or attempted monopolization, we find the ruling to permit such evidence not to be prejudicial error under all the circumstances. It is clear, nonetheless, that a considerable portion of plaintiffs' proof was directed towards defendants' low bidding procedures, and plaintiffs, as well as their experts, relied heavily on this testimony throughout, despite defendants' objections.

Section 2 of the Sherman Act makes it unlawful for any "person" to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States." In construing a § 2 claim, the Supreme Court has held that a plaintiff must establish "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.,* 364 U.S. 563, 570-

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[4]We do not endorse the reason given by the district court for this ruling. While we find no error in the holding that evidence of bidding practices may be relevant and admissible, we do not believe, as asserted, that its exclusion would be to "direct a verdict for defendants." We held in *Langenderfer I* that bidding "above the *total* average costs" of defendants was not an antitrust violation under the Sherman Act, and that the proper test for anticompetitive conduct in that regard was not whether defendants' bids were "above competitors' costs." 729 F.2d at 1055. The effect of *Langenderfer I,* it should be observed, was to set aside the judgment based upon plaintiffs' asserted cause of action for predatory pricing, which was the thrust of the first trial and appeal. The district court, however, charged the jury to the above effect. Plaintiffs' experts emphasized what they perceived to be low bidding and "predatory pricing" conduct of defendants.

71 (1966). Such prohibited power includes "power to control prices or exclude competition." *Grinnell Corp.*, 384 U.S. at 571; *United States v. E. I. duPont*, 351 U.S. 377, 391 (1956).

II. *STANDARD OF REVIEW*

Defendants' appeal is from the district court's denials of the motion for directed verdict and for judgment notwithstanding the verdict. In considering a motion for directed verdict, "the trial court 'must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury.' " *Milstead v. International Brh. of Teamsters*, 580 F.2d 232, 235 (6th Cir. 1978), *quoting O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975). Sufficient evidence "is such that, when viewed in the light of those inferences most favorable to the nonmovant, there is either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable men could differ. *Appellate courts apply this same standard.*" *Milstead*, 580 F.2d at 235 (citations omitted) (emphasis added). This same standard applies to motions for judgment n.o.v. *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978), *cert denied*, 441 U.S. 906 (1979).

We therefore consider whether plaintiffs have carried their burden of showing monopoly power and anticompetitive conduct.

> [A]s the case is presented to us, we must interpret the entire record in the light most favorable to [plaintiffs] and give to [them] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn. . . .
>
> Moreover, we must assume that the jury followed the court's instructions.

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604 (1985), citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

In applying the *Aspen Skiing* standard to the facts submitted to the jury, it is worth noting that this is the second jury to find in favor of plaintiffs Langenderfer and NOAP with regard to elimination of competition and domination of the market claims.

Once the jury has acted, we set aside its verdict and the district court's refusal to grant a j.n.o.v. motion only if we are satisfied, upon a thorough review of the record, that error has been committed. We also give plaintiffs the benefit of reasonable and favorable inferences that may be drawn from the evidence. We may not pass upon credibility of witnesses in making this review. To the extent, of course, that the district court drew or made legal conclusions based on the jury's responses to interrogatories, we may review decisions of law *de novo*.

III. *M & B CLAIM*

M & B has been in the asphalt paving business in several Ohio counties since about 1957. According to plaintiffs' exhibit 1 and the record, it has a base of operations only in Seneca County, Ohio, where it has maintained one or two asphalt plants over the approximately twenty-five years of its existence prior to the filing of this antitrust action in December 1983 against defendants. Seneca County is located in the extreme southeast corner of the thirteen-county relevant market as determined by the jury at trial.

In its brief in this cause, M & B maintains that over the entire relevant time period, it has bid in six counties. Its chief financial officer and one of its two principal operators, Robert M. Chesebro, however, testified that during the twenty year period up to 1980, it did 95 percent of its work in Seneca County and in adjacent Sandusky County.[5] Throughout, its "base of operations" remained in these two counties.

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[5]In a deposition, Chesebro stated that this two county area remained "pretty constant." He also stated that "Seneca and Sandusky Counties

M & B's plant and an available quarry at Bloomville are very near adjacent Huron and Crawford Counties, outside the thirteen-county area. M & B also bid and did work in Erie, Huron, and Crawford Counties, the latter adjacent to Seneca County to the south and east (Erie County is adjacent and east of Sandusky County). Chesebro testified he "very seldom" operated in Wyandot County. Plaintiffs' map identifying batch plants, stone quarries, and sandpits in the area in question in this litigation reflects that defendants have never had a single plant, quarry or sandpit located in Sandusky and Seneca Counties. It reflects, on the other hand, that during the relevant period there were two independent quarries located in Sandusky County, both available to M & B. There have been three quarries located in Seneca County, two of which were controlled by defendants' primary stone supply competitor, France Stone, and one belonging to Basic, which was the principal source for M & B until M & B acquired operating control of it in 1984. Chesebro conceded that the three largest quarries in the area of his operation were France, National Lime & Stone, and Sandusky Crushed Stone.

Plaintiffs also have a quarry at Rising Sun, very near both Sandusky and Seneca Counties, and there have been two other independent quarries located just south of the Seneca County line. There were no figures produced showing the sand production in these two counties of base operations of M & B. No sandpits in the two counties are reflected on plaintiffs' exhibit 1. Since early 1984 at least, M & B has had its

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account for *over* 90 percent of our work." (emphasis added) (referring to the entire relevant period). Defendants' credit officer Uhl testified, without contradiction, that M & B won bids on ODOT work in only three counties over twenty-plus years prior to trial. The amended complaint asserted that M & B "engaged in business as a general paving contractor principally in Seneca, Sandusky, and contiguous counties."

own supply of stone and sand, and it sells sand and limestone to other contractors. There is simply no proof whatever that defendants control or have any monopoly power over the supply of stone and sand in the area in which M & B operated from 1980 to the date of trial.[6]

The district court, in its jury instructions, presented M & B's alternative contention as to a relevant geographic submarket to be Seneca, Sandusky, Ottowa, Wood, Hancock, and Wyandot Counties, apparently those six counties in which it had submitted bids. There was insufficient evidence in the record to establish defendants' monopoly or attempted monopoly status in such a submarket, or that M & B was a real and active competitor in this submarket or in a two-county submarket during the relevant period. Two examples: (1) defendants had no quarry or sand facility in Seneca, Sandusky, Hancock, and Wyandot Counties in the southeast portion of the thirteen-county alleged relevant market or submarket areas; France and other independents had eleven quarries in these four counties; (2) plaintiffs and others operated six asphalt plants and defendants operated two in these four counties.

M & B claims that it was competing in a relatively free and open competitive market in its two-county area from 1966 to 1970. In those five years it earned, without control of any quarry or stone source, an average of less than $16,000 a year. During the years 1980 through 1986, for which it seeks damages for alleged anticompetitive conduct, it earned an average of *over* $16,000 in actual profits a year. Five of the

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[6]M & B's Chesebro testified also that M & B bought very little stone from defendants' quarry at Portage, and only on occasion. M & B bought or obtained few materials from defendants and cannot fairly be characterized as anything but a minor and infrequent customer. Defendants' alleged high stone prices, bringing about an alleged profit squeeze, would therefore seem clearly not to bear on M & B's situation directly, if at all.

six years after 1979 were profitable, and there was an increase in profit each year from 1982 through 1985. The loss year, 1981, when revenues were abnormally low, was due, in part, to the bankruptcy of a large contractor customer. In 1981, plaintiffs' exhibit 152AA reflects that M & B claimed damages of over $124,000 in 1981 because it suffered a loss instead of realizing the same 2.7 percent of pretax profit it realized on much lower revenues in the 1966-70 period. This loss is not explained in any fashion by M & B, and it defies reason and logic to assume that its entire 1981 loss, almost $77,000, plus another claimed amount of $47,000, was attributable somehow to defendants' low bidding practices in the southeast part of the thirteen-county area claimed by plaintiffs to be the relevant market.

The proof in this case demonstrates, moreover, that on several state asphalt paving jobs since 1980 in which M & B was the *only* bidder, it claims to have lost money. Chesebro also admitted that his company "always lost money on state work." It would seem illogical and unreasonable, then, to blame defendants for continuing losses on state turnpike work after 1980 under these circumstances, particularly in light of the fact that M & B has had, since 1984, its own source of stone and sand entirely independent of defendants' sources which are located outside of the area in which M & B does from 90 percent to 95 percent of its work and has its base of operations.

It does not carry the day on the issue of proving a relevant market within the thirteen-county area of northwest Ohio for M & B to argue that it is a "potential" competitor in the majority of the thirteen counties in which it has not operated at all for some thirty years of its existence at the time of the trial. M & B, as pointed out, has done work and has been an actual competitor with defendants, both before and after 1980, in basically only two counties. Contrary to M & B's assertions, we believe *City of Cleveland v. Cleveland Electric Illuminating Company,* 734 F.2d 1157, 1166-67 (6th Cir.),

cert. denied, 469 U.S. 884 (1984), is of no comfort to M & B's contention about the proper relevant market in this case. The market selected must "both 'correspond to the *commercial realities*' of the industry and be *economically significant.*" *Id.* at 1167 (quoting from *Brown Shoe Co. v. United States,* 370 U.S. 294, 336-37 (1962)) (emphasis added). The "commercial realities" here indicate strongly that M & B is neither an actual nor potential competitor in defendants' area of service and operation in and beyond the thirteen counties of northwest Ohio. Like the plaintiff in *City of Cleveland,* M & B presented no evidence that it planned to compete for business outside of Seneca and Sandusky Counties and areas immediately adjacent thereto.

The evidence is also undisputed that during the period from 1980 on there came about *increased* competition in the immediate area of concern to M & B in the form of additional, substantial competitors in the marketplace for asphalt paving. M & B had little actual competition with Price Construction Co. when its assets were acquired in 1969 by defendants.[7] The elimination of Price and defendants' acquisition of Ohio Engineering Co. were more than offset by the emergence of Miller and Gerken as serious competitors in the area. Eric Blacktop, another asphalt paving contractor, concededly also came into the M & B "bailiwick"—Seneca and Sandusky Counties—after 1980 from time to time to bid on projects in which M & B was interested. After 1980, in jobs in which M & B and defendants bid, M & B was the successful bidder in four of six projects.

It is not controverted but that M & B's bids on a number of jobs during the relevant period exceeded the State Engineer's estimate for these jobs. It is also not controverted that M & B's proportion of success on bids submitted on ODOT

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[7]Price did not sell its sand business to defendants; instead, defendants agreed to continue buying sand from Price (and others).

and OTC work in its area of operations did not decrease after 1980 in comparison to earlier periods. There is also no substantial evidence that the number of bidders decreased from 1979 through the time of trial. This would clearly indicate that M & B was not foreclosed, nor were others, from bidding on the asphalt work which is the subject matter of this controversy. It may also indicate that M & B's costs, even after acquiring its own quarry source, are higher than other competitive bidders in the marketplace. This evidence (and other proof in the record) indicates a failure to prove dangerous probability of success of monopolization by defendants in the area in which M & B operated or that competitors were driven from the market even after acquisitions were made by defendants. It does reflect that the real basis of complaint by M & B was the low bids submitted by defendants which plaintiffs characterize as predatory bidding or pricing. It should also be noted that this practice of low and successful bidding by defendants has extended over twenty years in northwest Ohio—some indication that it is not a short-range procedure designed to raise prices later, as indicated by plaintiffs' experts.

With respect to M & B's claims, we deem it appropriate to note the recent comments of another court which dealt with § 2 antitrust claims:

> The "dangerous probability" element of the attempted monopolization offense reflects the well-established notion that section 2 of the Sherman Act governs single-firm conduct only when it threatens actual monopolization. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767, 104 S. Ct. 2731, 2739, 81 L.Ed.2d 628 (1984). The Sherman Act protects competition, not competitors, and does not reach conduct that is only unfair, impolite, or unethical. *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1119 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001, 106 S. Ct. 420, 88 L.Ed.2d 370

(1985). As we recently emphasized in *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325 (7th Cir. 1986),

"[c]ompetition is a ruthless process. A firm that reduces costs and expands sales injures rivals—sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are by-products of vigorous competition, and the antitrust laws are not balm for rivals' wounds."

Id. at 1338.

This is not to say that injury to rival firms cannot ever lead to injury to consumers and that section 2 of the Sherman Act cannot be used to prevent such injury. But section 2

"must be used with the greatest caution. Action that injures rivals *may* ultimately injure consumers, but it is also perfectly consistent with competition, and to deter aggressive conduct is to deter competition. Thus, the plaintiff faces a stiff burden in any section 2 litigation. 'It is not enough that a single firm appears to restrain trade unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this

> manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.' "
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> *Id.* (quoting *Copperweld Corp. v. Independence Tube Cob.* 467 U.S. 752, 767-68, 104 S. Ct. 2731, 2739-40, 81 L.Ed.2d 628 (1984)).

Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1413-14 (7th Cir. 1989) (footnotes omitted).

In summation, then, we conclude that M & B failed to prove that it was realistically an economically significant competitor or potential competitor in the thirteen-county area claimed to be a relevant market; nor did it establish any claimed submarket in which defendants were shown to be actual or potential monopolists. There was also a failure of proof as to unfair competition or attempted monopoly by defendants in the principal area of operation of M & B. The undisputed material facts do not show that defendants have had a dangerous likelihood of success in the elimination of competition in M & B's area of operations since 1980. On the contrary, M & B has acquired control of a quarry site and has enjoyed increasing profits over the last four years for which proof was available through 1986. M & B did not show that it ever depended upon defendants as a significant source of sand or asphalt stone or other asphalt components, or that defendants discriminated against it in pricing products or in not affording it competitive discounts. Defendants, indeed, had no quarry or sand source in the primary area of M & B's operations—Seneca or Sandusky County. M & B cannot reasonably claim the benefit of the testimony of plaintiffs' experts that defendants' alleged "excessive profits on the stone level" worked a price squeeze on M & B. The primary evidence submitted by M & B, on the other hand, was the same type of predatory pricing evidence which was relied upon by Langenderfer in its original trial against defendants and found by this court to be insufficient in

Langenderfer I, 729 F.2d 1050 (1984), to establish a cause of action as a matter of law under § 2 of the Sherman Act. M & B's attorney, in his closing statement to the jury, asked for "$339,000 in damages for profits lost." The jury awarded M & B $350,000 in damages.

Under these circumstances, we must **REVERSE** the award pursuant to the jury verdict rendered to M & B. It follows that the award of attorneys fees and costs, based upon the judgment for M & B as a prevailing party, must also be reversed and set aside. M & B, of course, is therefore entitled to no injunctive or equitable relief.

IV. *SADER CLAIM*

The jury found in favor of Sader but answered specific interrogatories to the effect that there was no relevant market proved as to this plaintiff consisting of limestone, sand, or asphalt used in ODOT and OTC asphalt paving contracts as in the case of the other plaintiffs. The jury also answered interrogatories indicating that there was no relevant market proved as to Sader consisting of either ODOT or OTC asphalt paving contracts. The jury responded, however, that there was "a relevant geographic market or submarket for Sader," and determined that market to be the thirteen counties located in northwest Ohio. The jury found that acquisitions made by defendants were "all made to exclude &/or injure competition and increase Johnson's power," and that anti-competitive conduct caused injury to Sader in the amount of $250,000. In his final closing argument, Sader's attorney asked the jury for damages in the amount of $224,500.

Defendants argue on appeal that "Sader is neither a consumer nor a competitor in the relevant markets alleged." Defendants' Brief at 45. Gregory M. Sader, principal owner and officer of Sader since 1962, testified that he operates a small paving and excavating business (9 employees) headquartered in Bowling Green, Wood County, Ohio, located

in the north central part of the thirteen-county area in controversy. Sader is not ODOT "qualified," and cannot bid on ODOT or OTC asphalt paving contracts, although Sader does subcontracting on ODOT work. Defendants further argue that Sader failed to prove monopoly or attempted monopoly in "the markets in which Sader competes."

The brief filed on Sader's behalf responds that the issue in the case was whether "defendants' refusal to deal with Sader was for 'valid business reasons' or whether it was unreasonable anticompetitive conduct as Sader contended." Sader argues that this was properly a jury issue. Sader concedes it owned no quarry nor any asphalt plant, but asserts it depended on defendants for "stone, sand and asphalt at Bowling Green." Contending that it is irrelevant that it did not compete in the ODOT/OTC markets against defendants, Sader suggests that it was a "potential ODOT, OTC competitor that was foreclosed."

A number of factors with respect to Sader, as in the case of plaintiff M & B, would weigh strongly against any suggestion that Sader was, in reality, a potential competitor in the ODOT/OTC market. At the time Sader filed the complaint against defendants, it had been in business in the Bowling Green area for more than twenty years; by the time of trial, more than twenty-five years. It had never seriously sought to compete in the ODOT/OTC market which was the basis of the original monopolization complaint in this case. Sader, moreover, never indicated that it intended to compete with defendants beyond nearby Wood County, and the district court instructed the jury that Sader claimed a relevant submarket of Bowling Green, Wood County, and southern Lucas County.[8] Sader testified that his operation grew during the

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[8]Sader stated that in recent years 90 percent of his work was in Wood County and areas of nearby Lucas County. In earlier years he did work within and without the wider thirteen-county area, but again mostly in Wood County.

1960s despite defendant Johnson's acquisition of Wood County Stone Company, his principal quarry source, in 1961. (An independent operation, Urbana, had maintained a hot mix plant at this site from which Sader acquired asphalt "product" at the time.)[9] Stone was still made available to Sader at this nearby Portage quarry by defendants, but without the volume discount previously granted by Wood from and before 1960. (For a further discussion of Portage quarry costs and prices, see Part V, *infra*.) Sader testified that the "biggest majority" of his work was always in Wood and adjacent Lucas County (Toledo) with "emphasis" in Bowling Green. In the 1960s, defendants' OAMCO facility at Portage and their Maumee Stone site became Sader's chief suppliers, but not of sand. Like many other asphalt pavers, Sader trucked sand in from outside the thirteen-county area. Plaintiff MacRitchie Materials had a quarry at West Millgrove some 15 to 20 miles away from construction sites in and around Bowling Green. (Plaintiff also had a batch plant 15 miles away from Bowling Green at Waterville, and France had a quarry there and another about the same distance at Custor, the latter variously estimated at 15 to 17 miles from Bowling Green.)[10]

Sader testified that during the 1960s and 1970s, defendants began to exert pressures on him in bidding "in his area." Sader also trucked sand for the Creager Company, which was in financial difficulty when acquired by defendants in 1971. We attribute little significance to the Creager acquisition[11]

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[9]Urbana moved this plant away at the expiration of its lease. Sader testified that its superintendent later was employed by defendants. Wood's plant and equipment were taken over by Portage in 1964 or 1965.

[10]In cross-examining defendants' expert, Dr. Myslinski, Sader's counsel referred to Pugh and West Millgrove quarries as being 12 to 15 miles away from Bowling Green.

[11]Apparently, defendants continued to operate Creager after acquisition as a non-union facility in contrast to its other facilities. Sader complained this gave an advantage to defendants, but this has nothing to do with anticompetitive conduct.

insofar as it relates to Sader, who summarized his complaint about defendants generally by observing, "Johnson just blocked us basically from growing on a normal, healthy business way" during the late sixties and seventies. He also testified, moreover, that the plaintiff experienced difficulty in scheduling delivery of materials from defendants. In 1977, Sader complained personally to Kirkby about scheduling problems: "Ted said he would look into it, and see if he could not get it straightened out" but the problem allegedly continued.[12] Sader also encountered difficulties in scheduling rental trucks at times.

Sader complained about defendants' hot asphalt prices and the fact that, as with stone, they would not give him discounts on this product. Sader also said that plans he had with others in his same situation to set up an asphalt plant were discouraged by a threat that defendants "would not be able to supply our stone needs." Sader said he "pursued the plan" but never carried it out. (Each of the four or five quarries located in or very near the boundaries of Wood County had an asphalt plant operating at the quarry—this included the defendants' quarry at Portage.) Sader said that the planned source of stone was defendants' quarry at Maumee in Lucas County, more distant from Bowling Green than at least four other quarries which Sader characterized as not being "economically" located for his purposes.[13] He added that defendants' representatives in 1977 and 1978 were pressing for more asphalt business from him. He also claimed that defendants refused in 1977 or 1978 to allow him "to set up [a pugmill for a Perrysburg job] on the Lime City quarry site." Instead, he set it up at a nearby France quarry and he bought 25,000 tons of stone from France instead of defendants.

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[12]Sader admitted that most other "smaller pavers that worked the area was [sic] having the same problems with scheduling." Sader was thus not singled out or treated discriminatorily in that regard.

[13]Sader conceded that he bought "very little" stone from Maumee.

There is no doubt, however, that Sader's primary complaint, and the only one which we are persuaded has arguable merit, is its claim that it was cut off from buying materials because of cooperation with plaintiffs in pursuit of their claims at the first trial, Sader avers that at or about the time he agreed to give a deposition in that proceeding in 1979, defendants' credit representative called on him and told him he expected a check on Sader's account, and Sader agreed to pay it within a month. Sader asserts that he paid the bill of about $13,000, which he conceded was three months overdue.[14] Sader attributes to his 1980 testimony for plaintiffs a much lower than expected Johnson bid on a Bowling Green job which he subsequently lost. (He also claims that Johnson improperly used information he gave to them on this job to underbid him, Sader understanding at the time that Johnson would not bid on this job.)

Later, in 1980, Johnson "made special credit arrangements" for Sader, limiting his credit to $10,000 because Sader was persistently "slow pay." It was during this time that another dispute about credit arose between Sader and defendants. Sader also had been severely restricted in credit extended during 1982. Sader's version of a major dispute is that defendants furnished him defective asphalt for a large private driveway Sader installed and that the customer

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[14]A monthly bill on August 31, 1979 (Exhibit 9M) revealed that Sader owed Maumee Stone Co. nearly $47,000, a considerable part of which was at least 30 days old, and that in early September, Sader paid some $11,000 on this bill; Sader satisfied this account the following month, mid-October. Early in 1980, Sader's account reflected over $26,000 past due (up to 90 days) and he was warned, per telephone, that the "account is in serious condition and because of the status credit privileges have been removed." (Exhibit BP.) In fact, credit limits of $10,000 were later imposed. In 1982, credit privileges were again suspended for delinquent accounts. In March of 1980, by notice, France also advised Sader that its "account is seriously overdue," and his credit privileges were apparently withdrawn at a France quarry.

balked at paying him for the job. Defendants denied that the asphalt was defective and suggested testing the contested product. Sader held up any payment on his total account despite the fact that the driveway job in dispute involved only approximately $4,000. A lawsuit in an Ohio state court developed over this controversy, and Sader finally paid the $4,000 pursuant to a court order. Indeed, defendants employed lawyers in three different locations to handle commercial disputes and collections with Sader since 1980.

There is abundant, uncontroverted evidence in written communications from defendants to Sader that his accounts were consistently overdue in the 1979 to 1983 period, and that from time to time credit privileges during this period were withdrawn by defendants. During the same period, evidence reflects that France also suspended credit privileges for Sader in 1980 after numerous warnings; that American Asphalt products in Sylvania, Ohio, turned the Sader account over to attorneys for collection (again, after numerous warnings concerning an account of $2,200 in 1983); that an insurance agency was forced to threaten suit against Sader in early 1984 to collect an insurance account exceeding $15,000 more than 120 days delinquent. Many other witnesses testified that Sader was slow or delinquent in payment of its accounts during the period, although their companies did not cut him off. There is also clear evidence that defendants, during the relevant period, placed other of its customers, whose credit or financial condition was doubtful, on a cash basis for sale of its products. In short, the record establishes that a number of other persons with a contractual relationship with Sader had serious problems with Sader's failure to pay its accounts and either threatened or litigated with Sader concerning a past due balance, and that defendants cut off credit to others in similar "slow pay" circumstances.

It appears clear in this case that the problems between Sader and defendant in the relevant period arose out of commercial and credit controversies and did not arise in an anti-

trust context. That Sader may have been forced in some instances by credit restrictions to obtain asphalt materials from a source 15 to 17 miles further away than a defendant source is not a sufficient basis for this § 2 Sherman Act claim.

In overruling defendants' motion j.n.o.v. following the verdict for Sader, the district court cited *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843 (6th Cir. 1979), as authority. *Byars* is pertinent only with respect to its discussion of refusal to deal by a monopolist. *Id.* at 854. It was uncontroverted in that case that defendant Bluff City refused to deal on any basis with Byars, a competitor in the concededly relevant Memphis area market, in "primary life" magazines and periodicals. *Byars* recognized the general rule—"there exists no duty to deal, so long as the determination is made unilaterally." *Id.* Furthermore, "[e]ven the use of unfair business practices as part of the termination may not invoke sanction under the antitrust laws." *Id.* at 855. A monopolist, however, may be held to different standards, *Id.* at 855, citing *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), where Kodak provided no "independent business reason for its refusal to deal" and "Kodak had monopoly power over the national wholesale market." In *Byars*, we concluded that a refusal to deal practice should be condemned only if it is "unreasonably anticompetitive." 609 F.2d at 860. Even a "refusal to deal designed to accomplish vertical integration, without more, should not be a basis for imposing liability" upon a purported monopolist. *Id.* at 861. We observed further that courts should examine business reasons for a refusal to deal, and "must give them some leeway in making business decisions." *Id.* at 862.

Sader's brief not only cites *Eastman Kodak Co., supra*, and *Byars,* but also *Riverview Investments v. Ottawa Community Improvement Corp.*, 769 F.2d 324, 328 (6th Cir.) ("what matters is that freedom to compete is restrained"), *revised*, 774 F.2d 162 (6th Cir. 1985). We do not construe *Riverview Investments,* a combination or security case, as pertinent to

the refusal to deal aspect of this case. *Kerasotes Michigan Theatres v. National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988), also cited by Sader, was principally concerned with "leveraging" or misuse of monopoly power in one market to exclude a competitor from another market. We deem *Kerasotes* to have minimal relevance to Sader's claims. *United States v. Griffith*, 334 U.S. 100 (1948), mentioned by Sader in a footnote, is also, like *Kerasotes*, a theater and film case concerned with defendants who pooled their powers to exclude others from obtaining films for exhibition. None of these authorities is helpful to Sader here.

We conclude from a careful examination of the record in this case that there is insufficient evidence to sustain Sader's charge that defendants began to press him on payment of his past due account only when he agreed to give a deposition in this case in 1979 to Langenderfer.[15] We conclude also that there is insufficient evidence to support an antitrust claim of tying defendants' imposition of limits and restraints upon Sader's credit during 1980 through 1983 to his part in Langenderfer's suit. Essentially, it seems clear that defendants and Sader were engaged in a series of commercial disputes concerning his accounts, scheduling of pick-ups at defendants' facilities, and whether or not defendants were carrying out alleged credit understandings with Sader. The claim of refusal to deal is inextricably bound with the commercial and contract disputes between the parties, and was not proven to be a practice related to antitrust conduct.

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[15]Sader, upon cross examination, stated that he did not believe that his credit had been suspended in 1979 or 1980 when his deposition was taken and the first trial took place. He added that he would not have a problem if defendants "treated me like they treated everybody else" in credit matters. He conceded, however, that he had credit problems with defendants as early as 1978 and that this continued into 1983.

There was, moreover, similar to the M & B situation already considered, a failure by Sader to prove a relevant market in which Sader established the necessary essentials, including causation, under a § 2 Sherman Act claim. The physical location of alternative sources of stone and asphalt and other asphalt components to Sader's basic operations in Wood County and immediately adjacent areas might alone preclude any recovery of damages for antitrust injury in this case by Sader. There was also evidence of a number of competitors in the area. "The § 2 market definition looks to the existence of competitors as evidence of countervailing power which would preclude monopolization." *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum,* 579 F.2d 20, 27 n.11 (3rd Cir.), *cert. denied,* 439 U.S. 876 (1978). This plaintiff has essentially relied upon contentions of predatory or unfair low bidding by defendants on jobs in which he was interested, a basis we determined in *Langenderfer I* to be insufficient to support a damages claim for antitrust injury absent a showing that defendants' bids were below their total average costs.

There is insufficient proof in this record to show that defendants had a monopoly position, attempted a monopoly and had a dangerous probability of success in this regard, in the limited non-OTC, non-ODOT market in which Sader was involved. The vast weight of proof submitted by plaintiffs, upon which their experts relied, bore upon defendants' OTC and ODOT market share in a *thirteen*-county area. Sader was not a party who realistically competed in that market.

We are not satisfied from the proof adduced, after careful examination of the record, even if we assume the jury found that defendants cut Sader off from supplies at Portage in 1983 when suit was filed, that Sader established that this action was effected by an actual monopolist or one that threatened a realistic danger in the area of Sader's business activity in a relevant market.[16]

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[16]Being "cut off" meant essentially that sader was required to pay cash rather than rely on credit for certain periods of time. Sader was

> The ultimate inquiry in any attempted monopolization case remains whether the defendant has or reasonably might come close to having the ability to control total market output and prices.

Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1414 (7th Cir. 1989).

Defendants may be held liable to Sader only if proven to have refused to deal with him for anticompetitive reasons as a monopolist or attempted monopolist in some established relevant market. Without objection by plaintiffs the district court instructed the jury that plaintiffs claimed the existence of three "appropriate relevant product markets"—stone, sand, and asphalt —"used on ODOT and OTC paving contracts" and "bidding on a performance of paving contracts awarded to prime contractors by ODOT and OTC." None of these claimed relevant markets were proved with respect to the defendants as to the limited geographic area in which Sader was operating, and certainly not so with respect to monopolization as to sand and stone. No reasonable jury could find, on the evidence presented, that Sader was "cut off " at Portage or that defendants refused to sell stone to Sader based on an attempted monopoly.

We observe similarities between this case and *Trace X Chemical v. Canadian Industries*, 738 F.2d 261 (8th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985). Plaintiff Trace X, like Sader, claimed that defendant had misused monopoly power to refuse to deal with it and had refused it credit.

> On the basis of the evidence presented, CIL's refusal to extend credit did not amount to unreasonable anti-competitive conduct, but rather constituted a

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placed on a "permanent job basis" by defendants, after a number of revocations and reinstatements of credit, in August 1983.

> valid exercise of business judgment. It is certainly not conduct that is "possible or effective only if taken by a firm that dominates its smaller rivals." *Berkey Photo* [*Co., Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979)] at 275.
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> In support of its claim of anti-competitive conduct, Trace X argues that CIL threatened to discontinue supplying it with TNT unless Trace X paid for the $160,000 worth of TNT received but not paid for by Trace X. However, terminating or threatening to terminate deliveries to a purchaser who refuses to provide full payment is not predatory or unlawful anti-competitive conduct. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 715 F.2d 30, 34 (2d Cir. 1983), *cert. denied*, 464 U.S. 1043, 104 S. Ct. 711, 79 L.Ed.2d 174 (1984).
>
> This case does not involve a refusal to deal. CIL was willing to continue to supply Trace X with TNT; it merely refused to deal with Trace X on other than a cash basis. "Section 2 of the Sherman Act does not give purchasers the exclusive right to dictate the terms on which they will deal," *Fairdale Farms*, 715 F.2d at 34, nor does it require a monopolist to accede to every demand of its competitors or customers. *Glen Eden Hospital v. Blue Cross & Blue Shield*, 555 F.Supp. 337, 345 (E.D. Mich. 1983).

738 F.2d at 266-67 (footnote and citations omitted).

As did the defendant in *Trace X*, defendants here merely insisted on current payment and exercised "business judgment" and insisted on a "cash basis" method of doing business. As did the Eighth Circuit in *Trace X*, we likewise reverse the jury verdict rendered for Sader, and we note also that some evidence of anticompetitive conduct was present in *Trace X*.

For all these reasons then, (1) failure of proof concerning a relevant market and reasonably consequential damages; (2) failure to show defendants' monopoly position in asphalt, stone or sand in the principal area of Sader's operations during the period in question; (3) because the essential character of Sader's charges was related to ordinary commercial disputes rather than anticompetitive conduct; and (4) because a principal basis of Sader's proof of anticompetitive conduct was on predatory bid pricing, we must **REVERSE** and set aside the verdict for Sader. It again follows that the award of attorney fees and costs, based upon services rendered to Sader, must be reversed as well. Sader is entitled to no injunctive relief.

V. *MacRITCHIE MATERIALS, INC. CLAIM*

The plaintiffs' amended complaint sets out that MacRitchie has offices in West Millgrove where it operates a limestone quarry "which supplies stone and sand to Langenderfer, NOAP and other asphalt producers." Members of the "MacRitchie family" are "principal shareholders" of Langenderfer, NOAP, and MacRitchie. Plaintiffs' exhibit 1 shows its quarry, and the adjacent asphalt plant operated by Langenderfer or NOAP. MacRitchie's claim was not considered in the first trial pursued by Langenderfer and NOAP. Defendants never bought stone or sand from MacRitchie, which claims injury and loss by reason of defendants' claimed monopolistic practices, which caused it to lose business and sales to related plaintiffs and others.

Defendants assert that they do not possess monopoly power in limestone as a matter of law because of their market share of stone in the thirteen-county market. They also respond to MacRitchie's claim by contending that it is a claim of "indirect and remote" injury not caused by its conduct, even if that conduct were deemed to be anticompetitive. Finally, defendants assert that MacRitchie's claim is speculative and "unsupported by the testimony."

We note at the outset that the MacRitchie quarry is situated nearer, or as near, to southeastern Wood County, to Seneca County, to Wyandot County, to eastern Hancock County, and to southern Sandusky County, than any of defendants' quarries. The entire southeast quarter of the thirteen-county area is better served by MacRitchie's quarry, or by independent stone producers including France, the largest limestone operation in the entire relevant market claimed by plaintiffs, than by defendants' quarries. Defendants' nearest operating quarry, at Portage, also in Wood County, was located about ten miles northwest of MacRitchie's West Miligrove quarry. From 1971 through 1975, Portage had the highest comparative quarry costs of all of defendants' quarries, and only defendants' Rocky Ridge quarry exceeded its costs in 1976. Portage's average cost of stone was the highest of defendants' quarries analyzed by plaintiffs from 1982 to 1985.[17] Consistently throughout the 1981 to 1985 period, Portage and Rocky Ridge, defendants' nearest quarries to MacRitchie's, had the lowest gross margins of profit of defendants' quarries analyzed by plaintiffs, measured by the difference between average price and cost per ton. Defendants suffered by far their lowest operating income (measured by percent of pretax income from their quarry operations) from 1980 through 1982. Defendants' after-tax return on net worth based on stone operations was considerably reduced from 1980 through 1983, but returned to more normal levels in 1984 and 1985. MacRitchie, then, had every opportunity to be competitive with defendants in its quarry and limestone operations.

It is evident from the analysis of this data that defendants' quarry at Portage, the one which serves as the nearest competitor to MacRitchie's quarry, has relatively high costs of pro-

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[17]Rocky Ridge quarry, owned by defendants, slightly exceeded Portage's costs in 1983. Portage reflected no cost data in 1984, and its costs exceeded its average sales price in 1982.

duction and is less profitable than other quarries operated by defendants. It is also evident that MacRitchie's geographic location is superior to that of any of defendants' quarries in much of the southeast quadrant of the relevant market area. There are a number of highway asphalt pavement competitors located within twenty or twenty-five miles of MacRitchie's quarry.

An examination of limestone production of defendants and others within the thirteen-county relevant market area, including MacRitchie, from 1979 to 1986 was made by plaintiffs (exhibit 21A) and indicates as follows (in millions of tons):

DEFENDANTS	*1979*	*1980*	*1981*	*1982*	*1983*	*1984*	*1985*	*TOTAL*
Defendants	2.116	2.310	1.592	1.384	.982	1.136	1.159	10.679
France	3.515	2.849	2.164	1.502	2.513	2.334	2.602	17.479
Nat'l Lime	1.033	.857	.734	.739	.719	.899	1.076	6.057
Basic	.349	.305	.156	.157	.063	–	–	1.030
MacRitchie	.187	.232	.103	.111	.159	.126	.172	1.090
Others	2.222	1.702	1.301	.836	1.647	1.094	1.205	9.007
13 County Total:	9.422	8.255	6.050	4.729	5.083	5.589	6.224	45.342
Mich. Stone	.815	.566	.295	.277	.448	.582	.362	3.345
TOTAL:	10.237	8.821	6.345	5.006	5.531	6.171	6.576	48.687

Plaintiffs' exhibit 21A.

Michigan Stone is located outside the thirteen-county area in Michigan. Plaintiffs assert that because much of its production goes into the thirteen-county relevant market area, it should be considered as defendants' facility within the area. The percentage of road material furnished to the total market by defendants, by France, and by others (including MacRitchie) is reflected below. The figures in parentheses are arrived

at by computing Michigan Stone's production into defendants' (and the market's) total:

YEAR:	*DEFENDANTS:*	*FRANCE:*	*OTHERS*:*
1979	22.5% (28.6%)	37.3% (34.3%)	40.2%
1980	28.0% (32.6%)	34.5% (32.3%)	37.5%
1981	26.3% (29.7%)	35.8% (34.1%)	37.9%
1982	29.3% (33.2%)	31.8% (30.0%)	39.0%
1983	19.3% (25.9%)	49.4% (45.4%)	31.2%
1984	20.3% (27.8%)	41.8% (37.8%)	37.9%
1985	18.7% (23.1%)	41.9% (39.6%)	39.5%
Avg. 7 yrs.	23.6% (28.8%)	38.5% (35.9%)	38.0%

*Because all percentage figures have been rounded off to the nearest tenth, the figures across each row may not equal exactly 100 percent.

We doubt that it is proper for statistical purposes to include Michigan Stone's production/sales to the thirteen-county area, as is contended by plaintiffs. The more appropriate data would be the production of defendants' quarries in northwest Ohio, not including the Michigan facility. Including Michigan Stone's production, but excluding any other producers outside the thirteen-county area, skews the statistics in plaintiffs' favor.

The data reflects that after acquisition of all its quarries in the thirteen-county area, the last of which occurred in 1970, defendants from 1979 to 1985 (the period in which MacRitchie is involved as a plaintiff) controlled, on the average, 23.6 percent of the road material limestone in the relevant market alleged by plaintiffs. From 1983 through 1985, defendants controlled less than 20 percent. France, the largest

factor in the road material limestone market, controlled, on the average, nearly 36 percent of the market between 1979 and 1985. In the last three years of that period, France controlled, on the average, 44.4 percent of the market. Even if we include the production of Michigan Stone with the defendants' Ohio quarries for purposes of calculating defendants' market share, we find that defendants averaged less than 29 percent of the applicable highway limestone during the 1979-1985 period while France averaged about 36 percent. It may be readily observed that during the latter part of the seven year period, reflected in the table, defendants' share of the total limestone market decreased, particularly in comparison to France's share.

The limestone market share of defendants was, at most, around thirty percent and decreasing. Plaintiffs have cited no authority indicating that this meets Sherman Act § 2 requirements. There is no substantial evidence that defendants were capable of, much less achieved, the destruction of competition in limestone in any relevant market.

> To prove its claim of attempted monopolization, [plaintiff] has to prove that [defendant] had engaged in anticompetitive conduct with the specific intent to monopolize and that the attempt had a dangerous probability of success. *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981).
>
> Anticompetitive conduct is conduct designed to destroy competition, not just to eliminate a competitor. Lively legal competition will result in the efficient and shrewd businessman routing the inefficient and imprudent from the field. The antitrust laws must be administered in such a way that they do not restrain such vigorous competition in order to protect inefficient competitors. As Judge Learned Hand has pointed out, "The successful competitor, having been urged to compete, must not

> be turned upon when he wins." *United States v. Aluminum Company of America,* 148 F.2d 416, 430 (2d Cir. 1945). Merely to attempt to succeed in business is not anticompetitive conduct.

Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 823 (6th Cir. 1982).

In *Richter,* we considered market share and "dangerous probability of success" in attempted monopolization, observing:

> The third element of attempted monopolization is a dangerous probability of success. The greater a firm's market power the greater the probability of successful monopolization. In order to be found liable for attempted monopolization, a firm must possess market strength that approaches monopoly power—*the ability to control prices and exclude competition.*
>
> Market strength is often indicated by market share. During the relevant period, [defendant]'s market share declined from approximately 40% to approximately 30%. Given the facts of the case, such a share is not sufficient to establish [defendant]'s capacity to monopolize. *See United States v. Empire Gas Corp,* 537 F.2d 296 (8th Cir. 1976), *cert. denied,* 429 U.S. 1122, 97 S. Ct. 1158, 51 L.Ed.2d 572 (1977) (50% market share does not establish dangerous probability of success); *Lektro-Vend Corp. v. Vendo Co.,* 660 F.2d 255 (7th Cir. 1981), *cert. denied,* 455 U.S. 921, 102 S. Ct. 1277, 71 L.Ed.2d 461 (1982) (30% market share is not enough). The fact that [defendant]'s share of the market was declining also belies whatever inference of capacity to monopolize that may be drawn from the size of its market share. *Forro Precision, Inc. v. International Business Machines Corp.,* 673 F.2d 1045,

1058 (9th Cir. 1982); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 271 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S. Ct. 1277, 71 L.Ed.2d 461 (1982); *Nifty Foods Corp. v Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980).

691 F.2d at 826 (emphasis added).

"Dangerous probability of success" is but one of the elements of a Sherman Act § 2 claim that must be proved by MacRitchie in order to succeed:

> The offense of attempt to monopolize (Sherman Act § 2) is composed of the following elements:
>
> 1. Specific intent to monopolize;
>
> 2. Anti-competitive conduct;
>
> 3. A dangerous probability of success.
>
> *Lorain Journal Co. v. United States*, 342 U.S. 143, 153, 72 S. Ct. 181, 186, 96 L.Ed. 162 (1951). *Accord, Richter Concrete Corp. v. Hilltop Concrete Corp., supra*, 691 F.2d at 823; *United States v. Dairymen, Inc., supra*, 660 F.2d at 194; *Northeastern Telephone Co. v. American Tel. & Tel.*, 651 F.2d 76, 85 (2d Cir. 1981). Monopolization is the market power to control prices or exclude competition. *United States v. Griffith*, 334 U.S. 100, 107, 68 S. Ct. 941, 945, 92 L.Ed. 1236 (1948). Specific intent to monopolize may be inferred from evidence of anticompetitive conduct, *Lorain Journal, supra*, but not from legitimate business practices aimed only at succeeding in competition. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626, 73 S. Ct. 872, 889, 97 L.Ed. 1277 (1953).

White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 506-07 (6th Cir. 1983).

We reversed as "untenable" the district court's holding in *White & White* that a 25 percent market share[18] coupled with a finding of "leverage" and "link" practices satisfied the "dangerous probability of success" requirement. *Id.* at 508 (citing *Richter Concrete, supra*, and *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982)).

Other courts have reached the same result as in *Richter* and *White & White* in situations where a defendant charged with a Sherman Act violation had market shares larger than defendants have in this case (with respect to limestone). In *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977), a 47 percent-50 percent share in LP gas in a relevant market was held to be insufficient. In *Lektro-Vend*, a 30 percent or more market share was found insufficient as a matter of law. In *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980), a market share range of from 54.5 percent to 33 percent was determined to be insufficient. Similarly, in *Levitch v. Columbia Broadcasting System*, 495 F. Supp. 649 (S.D.N.Y. 1980), a 33 percent maximum market share was held insufficient. Judgment for the defendant, which had a 34-38 percent market share, charged with anticompetitive conduct and antitrust violations, was affirmed because there was no dangerous probability of success of monopolization in *Shoppin' Bag of Pueblo v. Dillon Companies*, 783 F.2d 159 (10th Cir. 1986). Even when plaintiff asserted that an alleged § 2 antitrust violator possessed a 65 percent market share, the court in *Hunt-Wesson Foods v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), found only that "this may provide a basis for inferring that

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[18]Defendants in *White & White* were found to have a market share in various markets of as much as 45 percent and over 30 percent in others.

Ragu possessed monopoly power . . . [and] sufficient to withstand a motion to dismiss."

We adhere to the views of Areeda & Hovenkamp, *Antitrust Law*, § 519.3 (1989 Supp.) that it would be rare indeed to find that a firm with only 25 percent or 50 percent of the market could control price over any significant period. "The monopolization offense is concerned with single firm conduct maintaining or expanding the economic power of a firm that is already a monopolist." *Id.*

There was no allegation by plaintiffs, no contention made, that defendants conspired with France with respect to monopolizing or attempting to monopolize the limestone market. Nor could there have been, since the evidence was that these entities were in direct competition, and the record showed that France was acquiring a greater market share during the later years despite defendants' acquisitions of quarries in the 1960s.

Plaintiffs introduced evidence at trial that combined the market shares of defendants and France, ostensibly in order to demonstrate market structure. Plaintiffs cite no authority in support of their theory and contention that they may combine the larger independent competitor France's limestone market share with defendants' share in order to establish the dangerous probability of success requirement. The fact that the prices and discount practices of these two substantial competitors may be similar is not evidence that they acted in conspiracy or concert to exclude competition, to control prices, or to commit unlawful anticompetitive practices. The testimony of plaintiffs' experts about anticompetitive conduct of defendants was mistakenly based upon their assumption that the shares of France and defendants should be taken as combined.

MacRitchie is faced with a perplexing dilemma in that its claim is somewhat at odds with the claims of its fellow plaintiffs. While the other plaintiffs complained of Johnson's low

bids on paving jobs, they also complained that Johnson charged them supracompetitive prices for component materials. If this were the case, it would seem to accrue to MacRitchie's advantage as a limestone supplier, rather than to its detriment. Furthermore, as noted, evidence regarding the limestone market fails to demonstrate that Johnson possessed power over prices. Defendant quarries, for instance, granted prompt pay discounts, as did France, but plaintiffs' quarries, a profit resource, did not. MacRitchie bought nothing from defendants and apparently matched the limestone prices at Portage, except as to discount policies which differed. As to the number of limestone quarries for road and highway operators in the relevant area, Burton MacRitchie conceded in his testimony that there were twenty or more quarries and half that many competitors furnishing limestone for roads and highways in the relevant market area, including France and Martin Marietta Corporation.[19] According to Burton MacRitchie (principal officer of MacRitchie), "Portage and our quarry are quite similar in price."

As pointed out in *Indiana Grocery, Inc. v. Super Valu Stores*, 864 F.2d 1409, 1413 (7th Cir. 1989), § 2 is directed to single firm conduct, whereas § 1 deals with concerted action and proscribes unreasonable restraints through combinations or conspiracies. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), for a discussion of the basic distinction between the two:

> The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual

[19]Martin Marietta was described in an antitrust suit by a sand and gravel operator which dealt in coarse gravel or stone used in construction of roads as "a large, diversified company with holdings in various fields including the production of sand and gravel (aggregates). It has aggregates holdings in fifteen states. . . ." *Chillicothe Sand & Gravel v. Martin Marietta Corp.*, 615 F.2d 427, 428 (7th Cir. 1980). France is owned by Koppers Corp., a large conglomerate.

> monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

Id. at 767-68 (footnotes omitted). "Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2." *Id.* at 758.

> The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively.

Id. at 769. Nor can activities of and between defendant entities be deemed anything but unilateral conduct, not concerted conduct for purposes of the Sherman Act analysis.

It is not necessary for us to rule on whether MacRitchie's claim for indirect damages gives it standing within the allowable parameters of *Southaven Land Co. v. Malone & Hyde,*

Inc., 715 F.2d 1079 (6th Cir. 1983), or *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). It is sufficient for us to note that it is doubtful that MacRitchie has such standing. We note further that during the relevant period, MacRitchie's market share in limestone increased rather than decreased in comparison to that of the defendants. We conclude that MacRitchie has failed to prove that defendants' limestone production share of the relevant market is sufficient, as a matter of law, to constitute a dangerous probability of monopolization. *See United States v. Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990).

In summary, we conclude that MacRitchie has failed to establish his claim against defendants under the Sherman Act. MacRitchie has stated in its brief that "defendants' control of stone, sand and asphalt gave them power over asphalt paving in all markets." MacRitchie has proven no control by defendants over sand in any market; it has proven no dangerous probability of success of monopoly by defendants in road limestone in any relevant market, and MacRitchie's claim of injury by reason of defendants' power over asphalt paving is an indirect claim at best, and must fall by reason of the failure to demonstrate requisite monopoly control by defendants over asphalt paving components. MacRitchie is a competitor of defendants only in limestone for roads and highways, and there is a failure of proof of defendants' monopoly power in this respect. There is no basis in law for attributing France's limestone market share and power to defendants.

For these reasons we must also **REVERSE** the award pursuant to the jury verdict rendered to MacRitchie.[20] It follows

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[20]In closing argument, MacRitchie's attorney claimed basic damages of approximately $188,745 for MacRitchie; the jury awarded $200,000. As of March 31, 1985, MacRitchie had an accumulated deficit of $560,000.

that the award of attorney fees and costs made on behalf of MacRitchie must also be set aside, and that MacRitchie is not entitled to equitable relief.

VI. *NOAP CLAIM*

In the amended complaint NOAP sets out that it is a separate Ohio corporation with offices in West Millgrove, Ohio, the same address of Langenderfer and MacRitchie. It was "engaged in the business of purchasing sand and stone . . . called 'highway construction materials,' mixing asphaltic concrete . . . and selling the materials and asphaltic concrete to plaintiff Langenderfer" and others. NOAP differs from MacRitchie in that it had no quarry but purchased stone, as well as sand, and resold them after mixing into "asphaltic" materials for road and highway construction. For reasons stated with respect to MacRitchie in part V, we reiterate that plaintiffs have failed to prove that defendants have monopolized or achieved a dangerous probability of success in attempting to monopolize the quarrying, stone, or sand markets in the relevant thirteen-county market area since 1979. For the same reasons stated in part V, NOAP has proved no claim since that date due to defendants' quarrying and sand operations. NOAP is thus entitled to no damages due to these operations for this period of time because of a failure to prove the requisites of a § 2 Sherman Act claim, due primarily to the lack of the required market share of defendants in the relevant market.

We conclude, in short, that defendants have not been shown to have the power at any relevant time to *control* prices or exclude competition in the sand and stone markets. *United States v. duPont,* 351 U.S. 377 (1956); *Southaven Land Co. v. Malone & Hyde,* 715 F.2d 1079, 1087 n.10 (6th Cir. 1983).

Through 1978, NOAP had four hot-mix plants in the relevant northwest Ohio area as noted in *Langenderfer I,* and we consider the claims of NOAP as an asphalt producer sepa-

rately from the claims of monopoly or attempted monopoly in stone and sand production.

Paragraph 18 of the amended complaint charges that defendants "overcharged [plaintiff] for highway production materials from 1980 through 1985" (when the amended complaint was filed), and will in the future. We conclude that the claim for overcharging for stone and sand must fail for the reasons stated. Stone prices of the defendants were generally consistent with the prices of the largest producer, France, and with plaintiff MacRitchie's prices at its quarry at West Millgrove.

Plaintiffs' exhibit No. 144 reflects the following data for the "concrete and road metal" market, 1974-1978, presumably including Michigan Stone's production:

YEAR:	*DEFENDANTS:*	*FRANCE:*	*OTHERS:*
1974	24%	24%	52%
1975	25%	22%	53%
1976	28%	32%	40%
1977	24%	32%	44%
1978	28%	29%	43%

(That same exhibit shows defendants' share of total quarry production for these years to be 17%, 18%, 19%, 18% and 19%, respectively).

It is clear from this data furnished by plaintiffs, even if Michigan Stone's production is included as applicable to the Ohio relevant market (which we conclude distorts the actual relevant market share allocations), that defendants come nowhere near as dominant a market position in stone prior to 1979 as in the years following 1979. This data indicates

no dangerous probability of success for any attempted monopolization in this particular area of stone production. With respect to sand production for any pertinent year, plaintiffs have failed in their effort to establish a § 1 or § 2 claim against defendants. To the extent, then, that NOAP's claim of anticompetitive unlawful conduct is based upon monopolization or attempted monopolization of stone and sand, it must fall. There is, again, no basis for combining defendants' stone production or market share of "concrete and road metal" from their quarries with that of their principal competitor, France. Plaintiffs have alleged no conspiracy between defendants and France and merely point to a similarity of prices for quarries that are in the same general area. NOAP has always had available to it, moreover, the stone quarry at West Millgrove, which is nearer a three or four county area within the northwest Ohio relevant market claimed by plaintiffs than any quarry of defendants.[21]

Burton MacRitchie, chief operating officer of both NOAP and Langenderfer, testified that in 1976 he considered that there were eight major paving competitors in the relevant market area.[22] NOAP claimed that it occasionally received discounts on stone bought from quarries later acquired by defendants, but never received such discounts after defendants acquired them. However, MacRitchie conceded that "the prices did not make a drastic change" after the acquisi-

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[21]Burton MacRitchie testified that his company, NOAP, and/or other MacRitchie family enterprises, operated an asphalt batch plant at the West Millgrove quarry from 1960 to 1980. He purchased stone and manufactured sand from France. He testified that he only occasionally obtained sand from defendants. Mr. MacRitchie testified also that MATCO was to the S.E. Johnson Co. as NOAP was to Langenderfer, both producing asphalt utilized by their paving companies.

[22]Burton MacRitchie conceded that there were a number of independent sand producers in Wyandot County serving the south and east part of the relevant market area and others in Indiana and Michigan serving the western and northern portions.

tions. Neither France nor defendants allowed volume discounts but did give prompt pay discounts. Plaintiffs' discount policy was apparently just the opposite. When defendants acquired a sand facility, the same discount price policy applied.[23] Plaintiffs contend that Union Quarries at Scott should be included in the thirteen-county relevant market area, although they are on the boundary line or just south of the line at the southeast edge. Production figures from this operation of defendants at Scott have been included in plaintiffs' statistical data. Ninety percent of stone purchased by NOAP and/or Langenderfer came from France or independents during the 1970s, and plaintiffs paid "board price" at France as well as at defendants' quarries.

In any event, accepting plaintiffs' proof (and some is distorted, as indicated), defendants' market share of stone before 1979 was insufficient to show a Sherman Act violation. In *Cargill, Inc. v. Monfort of Colorado,* 479 U.S. 104 (1986), the Supreme Court discussed a similar market share ratio possessed by Excel, a party in that proceeding:

> According to Monfort's expert witness, however, Excel's postmerger share of market capacity would be only 28.4%. . . . Thus Excel acting alone would clearly lack sufficient capacity after the merger to satisfy all or most of the demand . . . . With only a 28.4% share of market capacity and lacking a plan to collude, Excel would harm only itself by embarking on a sustained campaign of predatory pricing.

Id. at 120 n.15.

Cargill referred to a definition of predatory pricing set out in *Langenderfer I,* and made reference to Areeda & Turner,

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[23]France apparently allowed discounts on stone prior to 1972. France's prices and those charged by independent quarries were different. Independent quarries sometimes gave a volume discount.

Williamson on Predatory Pricing: A Strategic and Welfare Analysis, 87 Yale L.J. 1337, 1348 (1978), suggesting that even a 60 percent share would not be enough. *Cargill,* 479 U.S. at 119 n.15. The Court discussed predatory pricing allegations further:

> Claims of threatened injury from predatory pricing must, of course, be evaluated with care. As we discussed in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the likelihood that predatory pricing will benefit the predator is "inherently uncertain: the short-run loss [from pricing below cost] is definite, but the long-run gain depends on successfully neutralizing the competition . . . [and] on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." 475 U.S. at 589. Although the commentators disagree as to whether it is ever rational for a firm to engage in such conduct, it is plain that the obstacles to the successful execution of a strategy of predation are manifold, and that the disincentives to engage in such a strategy are accordingly numerous. *See, e.g., id.* at 588-593 (discussing obstacles to successful predatory pricing conspiracy); R. Bork, The Antitrust Paradox 144-159 (1978); McGee, Predatory Pricing Revisited, 23 J. Law & Econ., at 291-300; Posner, The Chicago School of Antitrust Analysis, 117 U. Pa. L. Rev. 925, 939-940 (1979). As we stated in *Matsushita* "predatory pricing schemes are rarely tried, and even more rarely successful." 475 U.S., at 589. Moreover, the mechanism by which a firm engages in predatory pricing —lowering prices—is the same mechanism by which a firm stimulates competition; because "cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they

> chill the very conduct the antitrust laws are designed to protect." *Id.*, at 594.

Id. at 121 n.17 (discussing § 16 of the Clayton Act).

In *Cargill,* the Court also discussed vigorous competition brought about by merger in a challenge by a smaller competitor:

> *Brunswick* holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.,* 729 F.2d 1050, 1057 (CA6), *cert. denied,* 469 U.S. 1036 (1984).

Id. at 116. The latter quotation was cited again with approval in *Atlantic Richfield Co. v. USA Petroleum Co.,* 110 S. Ct. 1884, 1892-93 (1990). *See also United States v. Syufy Enterprises,* 903 F.2d 659 (9th Cir. 1990).

But for NOAP's relationship as a principal supplier to Langenderfer, we find that it has established no antitrust injury by reason of defendants' stone and sand activities and mergers during any relevant period. Plaintiffs' exhibits Nos. 27 and 32 indicate that over a ten-year period (1967-1976), it

purchased two and a half times as many tons of sand and stone from France's nine locations as it did from all defendants and paid the same average price over this period of time. (Included in the purchases from defendants were sand and stone purchased from Michigan Stone.) That same exhibit reflects a total of only 10,000 tons of sand purchased by plaintiffs from Tri-State, acquired by defendants. The record also indicates that none of the plaintiffs were among the largest customers buying sand and/or gravel from Tri-State or defendants. NOAP's claim of approximately $73,000 based on variation in prices charged and alleged overcharges at defendants' quarries for stone (and/or sand) is clearly unallowable in any event. NOAP also has failed to establish that it was directly injured by defendants' sand and stone or quarry operations, even if deemed to be designed as anticompetitive in nature or motivation. We find no entry barrier to the market insofar as sand production is concerned.

May NOAP nevertheless recover for indirect damages, apart from the sand and stone aspects of this controversy, by reason of anticompetitive conduct of defendants, as paving contractors, directed toward and harming Langenderfer? We must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them" to answer this question. *Associated General Contractors v. Calif. Council of Carpenters,* 459 U.S. 519, 535 (1983). This court has focused on the directness of the injury in a claim of this kind in *Volasco Products Co. v. Lloyd A. Fry Roofing,* 308 F.2d 383 (6th Cir. 1962), *cert. denied,* 372 U.S. 907 (1963). We have also looked to see whether the injury claimed is arguably within the zone of interests protected by the antitrust laws. *Malamud v. Sinclair Oil Corp.,* 521 F.2d 1142 (6th Cir. 1975). *See also* Sherman, *Antitrust Standing: From Loeb to Malamud,* 51 N.Y.U. L. Rev. 374 (1976). The inquiry resembles the "elusive" test of proximate cause in a given situation. *Associated General Contractors v. Carpenters,* 459 U.S. at 535-36.

> A number of other factors may be controlling. In this case it is appropriate to focus on the nature of the plaintiff's alleged injury. As the legislative history shows, the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market. Last Term in *Blue Shield of Virginia v. McCready, supra*, we identified the relevance of this central policy to a determination of the plaintiff's right to maintain an action under § 4 [of the Clayton Act]. McCready alleged that she was a consumer of psychotherapeutic services and that she had been injured by the defendants' conspiracy to restrain competition in the market for such services. The Court stressed the fact that "McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." 457 U.S., at 483, citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477, 487-489 (1977). After noting that her injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market," 457 U.S., at 484, the Court concluded that such an injury "falls squarely within the area of congressional concern." *Ibid.*

Associated General Contractors v. Carpenters, 459 U.S. at 538.

NOAP claims damages because of the alleged wrongful injuries to sister corporation Langenderfer, its principal customer, leading to the latter's demise as a direct paving contractor competitor of defendants. A factor to consider under these circumstances is "the directness or indirectness of the asserted injury" *by NOAP.* Langenderfer, as an "immediate victim," suffered direct injury, which will be discussed below. *See Associated General Contractors,* 459 U.S. at 540-41.

We must look, then, under *Associated General Contractors* principles, to "the chain of causation," and whether "the alleged effects" on NOAP also "may have been produced by independent factors," and whether or not its claim is merely "speculative" in nature. *Id.* at 541, 542. Courts have a legitimate interest in these cases of avoiding the "risk of duplicate recoveries on the one hand or the danger of complex apportionment of damages on the other." *Id.* at 543-44. *See also Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), and *Kansas and Missouri, etc. v. Utilicorp United, Inc.,* 110 S. Ct. 2807 (1990).

We have cited, with approval, a rule adopted in the Second Circuit:

> The oft-cited decision of *Calderone Enterprises v. United Artists Theatre Circuit,* 454 F.2d 1292 (2d Cir. 1971) provides the following rule:
>
> "[T]his court has committed itself to the principles that in order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly, we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than being 'targets' themselves."
>
> *Id.* at 1295 (emphasis added). *Calderone,* therefore, excludes as targets those "who have suffered economic damages by virtue of their relationships with 'targets'." *Id.* at 1295.

Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1081 (6th Cir. 1983) (footnote omitted).

We discussed the relationship between direct injury, proximate cause, and standing in light of *Brunswick Corp. v. Pueblo*

Bowl-O-Mat, 429 U.S. 477 (1977); *Blue Shield of Va. v. McCready,* 457 U.S. 465 (1982); and *Associated General Contractors,* in *Southaven Land.* We concluded that

> innumerable elements, including proximity and directness, constitute proper areas of inquiry in identifying a "person" injured by reason of a violation of the antitrust laws within the meaning of § 4. Examination of these factors facilitates identification of "who is entitled to prosecute an action under § 4." *Associated General Contractors, supra.*

Id. at 1085 (footnote omitted).[24]

Although the issues are extremely close as to NOAP's antitrust claims of indirect injury by reason of Langenderfer's direct injury, we conclude that NOAP may not claim damages in this indirect capacity. We recognize that NOAP may be encompassed by the broad language of the Sherman Act, but we are persuaded that the principles of *Associated General Contractors,* considered collectively, bar this claim. We reach this conclusion because (1) NOAP has no proven direct claim with regard to stone and sand; (2) its claim is essentially indirect and derivative of Langenderfer's; (3) NOAP was essentially only a minor consumer of defendants' products and had available independent and competitive resources; and (4) its indirect and separate claims are speculative and involve the serious risk of "duplicative recoveries."[25]

We, therefore, **REVERSE** the award of damages insofar as NOAP's claims are concerned and, consequently, we **REVERSE** any award of attorney fees based on a jury award to NOAP.

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[24] *Southaven Land,* like *Associated General Contractors,* discusses § 4 of the Clayton Act but it is entirely relevant to discussion of the antitrust claims in this case.

[25] *See Associated General Contractors,* 459 U.S. at 544.

VII. *ARTHUR S. LANGENDERFER CLAIM*

For the second time a jury has examined the evidence adduced in this antitrust dispute between Langenderfer, a paving contractor, and defendants. At the first trial, the jury found "actual damages" of $982,117, which we set aside for a new trial. Upon the conclusion of the proof at the second trial, the jury returned a verdict of $1,675,000 (coupled with the NOAP claim) based upon its response to interrogatories to the following effect (as to Langenderfer, a separate corporation):

> (1) There was a relevant market consisting of limestone, sand, and asphalt used in ODOT and OTC asphalt paving contracts and Langenderfer competed in this market.
>
> (2) There was a relevant product market consisting of both ODOT and OTC asphalt paving contracts and Langenderfer competed in these markets.
>
> (3) There was a relevant geographic market or submarket for Langenderfer (the 13 counties).
>
> (4) Defendants had monopoly power in the relevant markets as to limestone, sand, and asphalt used in ODOT and OTC contracts.
>
> (5) Defendants willfully acquired and used monopoly power in each of these relevant markets.
>
> (6) Defendant engaged in anticompetitive conduct by making acquisitions "to exclude and/or injure competition and increase Johnson's power which he succeeded in doing."
>
> (7) Defendants' monopolization caused injury to the business and property of Langenderfer.
>
> (8) Defendants had a specific intent to achieve a monopoly on the relevant markets and engaged in anticompetitive conduct to achieve a monopoly.

> (9) Langenderfer suffered injury to its business or property as a result of defendants' attempt to monopolize.

Defendants moved for a judgment notwithstanding the verdict, which was overruled viewing the evidence on behalf of Langenderfer (and other plaintiffs who also obtained a favorable jury verdict) "in the light most favorable to plaintiffs," with the district court's statement that the "judge's duty is essentially to see that there is no miscarriage of justice." We have heretofore indicated that the district court was in error in failing to direct a verdict, or in refusing to grant j.n.o.v. with respect to other plaintiffs. After full consideration of all of the evidence in the view suggested by the district court, and after reviewing the applicable law, we are persuaded that Langenderfer was entitled to effect a recovery for damages from defendants.

In *Langenderfer I*, as noted by the district court, we held that

> *Brunswick* [429 U.S. 477] requires that Langenderfer's injury result either from a lessening of competition due to the acquisitions or from "anticompetitive acts made possible" by the acquisitions. . . . [T]he issue of whether Langenderfer's injuries resulted from "anticompetitive acts made possible" by the acquisitions was properly a jury question.

729 F.2d at 1058-59.

The jury responded to an interrogatory that defendants made acquisitions to affect competition adversely and, in effect, succeeded in doing so. Our function is to determine whether the jury acted without any substantial or sufficient basis on the evidence in the case, considered favorably from Langenderfer's standpoint, in rendering its substantial verdict. Contrary to plaintiffs' assertions in their brief, we note

first that much of the evidence in the case did relate to defendants' bidding practices characterized by various of plaintiffs' witnesses as unrealistically or oppressively low so as, allegedly, to foreclose successful bidding on ODOT and/or OTC jobs by others. The district court did instruct the jury, however, that "defendants' profitable bidding does not constitute anticompetitive conduct as a matter of law, and you may not base a verdict on the fact that defendants were able to bid lower than competitors and still make a profit." We believe that the instruction cured improper inferences that might otherwise have been drawn by the jurors to the effect that defendants' asserted predatory pricing practices (bidding too low) were the real basis for Langenderfer's (and other plaintiffs') cause of action for anticompetitive conduct.

The district court's jury instructions advised the jury that plaintiffs contended first that defendants were engaged in "monopolistic stone pricing." As previously noted, we conclude that plaintiffs' proof in that respect failed as a matter of law. The district court properly included in its jury instructions the following:

> [I]n deciding whether defendants' limestone market share suggests to you that defendants have monopoly power, you may not combine defendants' market share with France's market share.

There was simply *no adequate evidence* to establish that defendants were engaged in monopolistic stone pricing, or that defendants controlled or attempted to control stone or quarrying in any relevant market claimed by plaintiffs. Nor was there meaningful evidence to show that defendants tied "the sale of stone and sand to the sale of asphalt," as contended by plaintiffs at trial. There was no showing that defendants controlled the sources or supply of sand in any relevant market claimed. This was one basis for holding that NOAP failed to prove its claim.

The remaining contentions of Langenderfer (and other plaintiffs except Sader), as included in the district court's jury instructions, were

> (1) "price or profit squeezing and cross subsidization;"[26]
>
> (2) "leveraging its [Johnson's] position in ODOT and OTC;"
>
> (3) "intimidating, discouraging, coercing and retaliating against competitors."

See also supra note 1.

Langenderfer's brief tracks its contentions after noting that defendants had stipulated the "ODOT/OTC asphalt paving market in the thirteen counties in the *Langenderfer I* appeal. 729 F.2d at 1052-1053." We conclude that this thirteen-county ODOT/OTC asphalt paving market is established. Langenderfer then claims that defendants' alleged "monopoly over OTC/ODOT work extended to various submarkets and gave defendants anticompetitive leverage over asphalt paving work for counties, municipalities, townships, etc." In light of our previous detailed discussion about defendants' sand and stone operations, the relevant product markets are ODOT and turnpike asphalt paving contracts and the supply of asphalt used therein, but not "the supply of approved construction materials," such as stone and sand,

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[26]The district court discussed in the jury instructions plaintiffs' contention about "price squeeze" or "profit squeeze" or "cross subsidizing." This contention was that "defendants have *used their monopoly power in stone* to gain an unfair advantage in paving." (emphasis added). As we have seen, however, defendants did not have sufficient market power or price control in limestone to constitute monopoly power. Plaintiffs' theory of "duopolization" through their expert witness, Dalton, simply had no legal basis of support in treating and combining the shares and practices of France with those of defendants to evidence alleged monopoly power and control.

which Langenderfer essentially obtained from its own sources, its sister corporation NOAP, and others. Plaintiffs concede that the market for ODOT/OTC work "is distinct from that done for counties, townships, municipalities and private parties." Plaintiffs' Brief at 7; *see* Burton MacRitchie's testimony.

Because we are concerned with respect to Langenderfer, not with defendants' stone and sand operations (which the proof failed, as a matter of law, to show were either monopolies or involved any dangerous probability of becoming monopolies), we will consider the asphalt and asphalt paving aspects of the case as proved by Langenderfer.

We conclude that defendants may not be held liable for antitrust conduct to the extent that, as asphalt paving contractors, they acquired additional limestone and/or sand sources which added to their efficiency and ability to submit profitable low bids on public highway contracts. Burton MacRitchie testified that during the time defendants began to expand and integrate their operations, he, as part owner and a principal in Langenderfer, desired to do the same when opportunities presented themselves. Arthur Langenderfer, the majority stockholder, however, declined to take advantage of such business opportunities, and MacRitchie conceded this was a bad business decision. Defendants' low bidding, of course, in a real sense, inured to the benefit of the public and extended over many years in the relevant market. We have found previously no proven predatory pricing by defendants. There is no substantial evidence that defendants refused to deal with Langenderfer (or other plaintiffs) in respect to limestone or sand sources except on rare occasions where defendants themselves needed to utilize these materials in their asphalt production and paving with respect to successful bids. Defendants' stone prices were competitive with France, the largest producer in the relevant market, and were not substantially different from prices charged by plain-

tiffs themselves, although such prices varied from one geographic area to another.

The acquisitions by defendants proved by Langenderfer were set out in *Langenderfer I*. The first pertinent acquisition other than quarrying or asphalt paving contracting or asphalt, as such, was the 1961 acquisition of C.P. Calaway, a bridge contractor. Nothing in this acquisition, however, would tend to show elimination of an asphalt paving contractor competitor, nor does it relate to control over asphalt supply or the "concrete and road metal" market, in our view. The acquisitions which might reasonably be deemed to bear upon asphalt paving competition began in 1969 with Price Companies. Mr. Price testified that his company was only a "very minor" competitor with defendants' one plant at Parkertown, near the eastern boundary of the relevant market area. Price sold one of his asphalt plants in the Toledo area to another party, and it was Price who contacted defendants to buy his asphalt paving business. Defendants met his asking price for the business in the eastern fringe of the thirteen-county area and required that he sign a noncompetition agreement. Defendants also agreed to buy sand from Price as a part of the package, with a right of first refusal in the event of a proposed sale of the sand operation.[27] It is difficult, under all the circumstances, to find the Price acquisition to be anticompetitive with respect to Langenderfer's operations located some considerable distance away. There is no indication that Price was ever in substantial competition with Langenderfer, and Price retained, and still operates, his sand production facilities.

The first significant paving contractor acquisition by defen-

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[27]Price's principal plant at Norwalk, Ohio, was *outside* the bounds of the thirteen-county area by a distance of approximately 15 miles, and he operated principally in Huron and Erie Counties, outside the relevant market area.

dants was Ohio Engineering Co., which conducted about one-half of its operations in the thirteen-county area (the southeast portion) and one-half outside (Crawford, Hardin, Allen, and Marion Counties including Delaware). Ohio Engineering operated plants situated on National Lime & Stone's property in Findlay, Hancock County, when acquired by defendants in 1970, and one at Carey, Wyandot County. (Other Ohio Engineering Co. asphalt plants were situated south of the relevant market area but later moved within that area.) Ohio Engineering had been closely allied with National Lime & Stone Co., and it was a competitor of defendants "on rare occasions." Ohio Engineering Co. was purchased in 1970 and subsequently operated as a division of defendants.

In 1971, defendants acquired Creager, a competitor that was failing and ultimately was acquired by defendants for $1 plus the debt it owed for materials and supplies. No reason is shown why other parties, including plaintiffs, might not have acquired Creager for a nominal price in 1971 had any of them sought to do so. While this may be deemed to be acquisition of a failing competitor, a nonunion operator, it is of little practical or legal effect since it is clear that had no acquisition been made, Creager would have ceased to do business entirely. That competitor would simply have gone out of business in 1971. Creager, in other words, without dispute, was not a *viable* competitor in any sense when acquired in 1971.

With respect to Ohio Turnpike contracts awarded during the relevant period, plaintiffs' exhibit 69 reflects that Langenderfer bid successfully on one joint venture with Johnson from 1967 through 1969, during which time defendant Johnson won one other bid. In 1970 and 1971, Langenderfer was unsuccessful on one bid each year, whereas Johnson was successful on one bid each year. Johnson was the only successful OTC bidder on three jobs in 1972, Langenderfer unsuccessfully bidding on two. On the other hand, Langenderfer was successful on its one bid in 1973, Johnson on two of three;

in 1974, there were no bids and in 1975, both Langenderfer and Johnson were successful in one of two bids. In 1976, Johnson was successful in its one ODOT bid, but lost to Langenderfer on the one competitive bid in 1977, apparently the last time Langenderfer bid on OTC projects. In sum, from 1973 through 1977 Langenderfer was successful on three of its five OTC bids and Johnson was successful on four of seven, but the latter won on the larger jobs. This evidence of plaintiffs, standing alone, is insufficient to establish monopolistic control of the OTC market by defendants from 1967 through 1977. During this same period, two other paving contractors bid successfully on OTC jobs, and there were a number of other bidders. This data of plaintiffs indicates, if anything, that Langenderfer became more active from 1973 through 1977 and was relatively more successful than it had been before that time on OTC bids.

According to plaintiffs' exhibit 70, defendants' share of the Ohio ODOT market decreased from 1966 through 1968 (down to 29 percent), but then increased dramatically in 1969 to 73 percent. During this period, Langenderfer's market share (approximately 3 percent on its own bids) remained relatively constant (up to 8 percent in 1968). In 1971, defendants' market share of the ODOT contracts dropped to 11.8 percent while Langenderfer's was 11.4 percent. Through 1971, then, there is clearly no statistical showing, as a matter of law, that defendants had monopoly power or likelihood of monopoly power in the ODOT market. Plaintiffs' exhibit 71 reflects that Langenderfer's dollar amount bid successfully on contracts (ODOT and OTC) in 1971 was over $814,000, which was more than double the average of the comparable dollar amounts won from 1968-1970. Langenderfer's 1971 amount constituted a higher market share of ODOT and OTC contracts (8.7 percent) than it realized even in 1968 (6.4 percent), the year in which it realized its highest pretax net income. This would demonstrate no monopoly threat by defendants in 1971 even *after* the acquisitions of Price, Ohio

Engineering and Creager. Excluding the year 1969, which seems to be an anomaly,[28] defendants' average annual market share of the Ohio ODOT contract market from 1966 through 1971 was 34.6 percent, and there were numerous serious competitors, including Langenderfer, in that market. This is an entirely insufficient basis for a monopolization showing through 1971, especially since the defendants' share was decreasing in 1970 and 1971 with respect to ODOT asphalt paving business.

For the years following 1971 and until Langenderfer went out of business, plaintiffs' exhibit 70 reflected the following as to ODOT market share:[29]

YEAR	*DEFENDANTS*	*LANGENDERFER*
1972	55% (65%)	5%
1973	52% (58%)	16%
1974	83% (83%)	7%
1975	38% (53%)	6%

[28]The 1969 pretax profit figure of $189,382 for Langenderfer is indeed difficult to accept as "normal." It is considerably more than the same pretax profit totals for 1966, 1967, 1968, and 1970 *combined.* Plaintiffs' exhibit 71 reflects also that in 1969 Langenderfer was awarded bids on three ODOT and OTC contracts totalling only $237,168. It is not possible, therefore, that Langenderfer's profits for 1969 came from ODOT and OTC work. (In 1968, the successful bid awards for Langenderfer were $380,063; thus, this data reflects that ODOT and OTC contracts could not have carried over as a substantial part of a profit source in 1969.) We are, therefore, inclined to regard this 1969 figure as a less-than-reliable basis for claiming average profits by Langenderfer. The basis for any substantial profit in 1969 must have been from non-ODOT/OTC work.

[29]The figures in parentheses reflect defendants' combined ODOT/OTC market share. Plaintiffs' exhibit 71; *Langenderfer I,* 729 F.2d at 1054 n.6.

1976	57% (63%)	10%
1977	75% (70%)	3%
1978	45% (51%)	-0-
Average (7 yrs.)	58% (63%)	7%

In contrast to the years through 1971, the above data, accompanied by the paving contractor and asphalt plant acquisitions made in 1970, 1971, and 1972, are sufficient to indicate that Langenderfer may reasonably have proved the cause of action alleged, coupled with the defendants' high percentage of ODOT winning bids from 1973 until Langenderfer's termination of business, and other circumstances of defendants' growing economic power. We reach this conclusion being mindful at the same time of this statement by a prominent authority in this respect: "There is substantial merit in a presumption that market shares below 50 or 60 percent do not constitute monopoly power." Areeda & Hovenkamp, *Antitrust Law*, § 518.3 (1988 Supp.).

Langenderfer charges not only monopolization but also attempted monopolization for the pertinent period preceding its going out of business. There is evidence, as previously noted in *Langenderfer I*, that defendants "intended to eliminate competition and dominate the market." 729 F.2d at 1054. We recognized also in *Langenderfer I* that "Johnson attained economies of scale which enabled it to operate at a much lower cost per paving project than its competitors." 729 F.2d at 1058. Langenderfer has, we believe, made a sufficient factual showing to support the essence of the jury's finding that Langenderfer suffered injury by reason of defendants' conduct and that such injury resulted in significant part from "a lessening of competition due to acquisitions or from 'anti-competitive acts made possible' by the acquisitions." *Langenderfer I* at 1058. We do not find that plaintiffs have made any required showing of "monopolistic pricing" in stone and sand, as noted, but acquisitions, elimination of

competition, and other anticompetitive conduct by defendants, referred to also in *Langenderfer I*, support an award for Langenderfer. We find also that an interstate commerce nexus has been established based on the proof submitted.

Although "monopolistic pricing" in stone and sand was not established, acquisitions by defendants of quarry sites coupled with the use of lengthy non-competition agreements and other circumstances did foreclose production and efficient use of such quarries and limestone by Langenderfer and others as competitors of defendants. Plaintiffs point also to the comparative size and economic power of defendants, particularly from and after 1970, to support their argument in this respect. The jury is entitled "to look at the whole picture" with respect to allegations and evidence of Sherman Act § 2 violations. *American Tobacco Co. v. United States*, 147 F.2d 93, 106 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946).

We conclude, although the issue is a very close one, that Langenderfer has presented sufficient proof for a reasonable jury to find defendants guilty of unlawful monopoly or attempted monopoly and anticompetitive acts in asphalt paving contracting in the northwest Ohio relevant market area in OTC and ODOT work during the 1973-1978 period.

Damages

Langenderfer was awarded damages by the jury of $1,675,000 (before trebling). This figure was arrived at using figures supplied by plaintiffs, and reflects injury for the years until 1978, the year Langenderfer went out of business, as well as for the years 1978-1987. This damage calculation includes damages for *both* Langenderfer and NOAP.

An appellate court reviewing damages may adjust and/or correct the jury's award based on clear error in calculation and based on the actual claims submitted to the jury in closing argument. *H.J., Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531, 1549-50 (8th Cir. 1989). We find such an adjustment

appropriate for several reasons. First, as noted, the jury's award was for Langenderfer and NOAP, and we have concluded that NOAP is entitled to no recovery. Furthermore, we find that some of the dollar figures offered by plaintiffs and their experts simply fail to reflect economic reality, and we shall make adjustments accordingly, while continuing to give Langenderfer the benefit of all reasonable inferences.

Base damages

The first step in computing damages suffered by Langenderfer as a result of defendants' anticompetitive activities is to arrive at a reliable estimate of Langenderfer's average profits in representative years before it suffered antitrust injury. At trial, plaintiffs introduced evidence of Langenderfer's profits for the years 1966-1970, and arrived at an average annual profit of $81,758, including NOAP. When NOAP's profits are eliminated, the average annual profit for Langenderfer alone for 1966-1970 is $58,353. Plaintiffs' exhibit 150. We believe that this figure is not a reliable barometer for computing losses suffered by Langenderfer.

The "principal portion" of Langenderfer's work in the seventies was "state highway work . . . [because] by that time the bulk of the interstate system was completed." (B. MacRitchie). This winding up of interstate work in the early 1970s had an adverse effect on many highway paving contractors in northwest Ohio,[30] and "the majority of the [public] work was ODOT and turnpike" for Langenderfer during the relevant damages period before it terminated its asphalt paving operations in 1978. During the pertinent times, Langenderfer (or its sister corporations) remained in the limestone quarry business, generally a more profitable business. While Lan-

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[30]Burton MacRitchie conceded than the amount of work available to paving contractors in northwest Ohio dropped by more than half during the early 1970s; it provided "fewer opportunities to bid." Langenderfer began losing money at the same time in 1971.

genderfer was losing money on its state work in the 1970s, it continued to do private road contracting and paving work profitably even though competing with defendants. In 1971, for example, private work constituted about 75 percent of Langenderfer's volume. Although after 1971 Langenderfer did an increased volume of state work, this became increasingly unprofitable whereas the private work remained profitable.

In the early 1970s, Langenderfer had a profit on the 75 percent of its paving business in the private (non-ODOT/OTC) area. Plaintiffs' exhibit 150, moreover, shows a precipitate drop in Langenderfer's "base period pretax profit" from 1968 to 1970—$85,047 and $24,812, respectively, in the last two years. This affords no legitimate basis for Langenderfer's claiming an "average" profit loss of $58,353 based on pretax profits during the years 1966-1970, when interstate highway construction was at its peak, as Langenderfer has done here. Plaintiffs' exhibit 150.

We have indicated that there was insubstantial evidence that defendants had monopoly power in, or a dangerous probability of success at attempted monopolization in, the ODOT/OTC market through 1971 or 1972, and there is little hard evidence to justify using the 1966-1970 average annual pretax profits of $58,353 for Langenderfer as a basis for claiming "normal" profits to utilize as a comparison to the actual profits or losses from 1973 forward when defendants dominated the ODOT bidding. M & B's profits, as a realistic competitor, in comparison, reached its average 1966-1970 profits only once between 1980 and 1984. Defendants' average net profit expressed as a percentage of its consolidated asphalt and construction revenues was 4 percent between 1966 and 1970. Between 1979 and 1984, defendants' net profit percentage was only 2.3 percent. Plaintiffs' exhibit 119S. From 1978 through 1985, defendants' net income percentage, as reflected by the same exhibit, was less than 2.4 percent compared with the 1966-1970 figure of 4 percent.

(Income from quarrying operations enjoyed a consistently higher ratio.)

An examination of plaintiffs' exhibit 71 reflects that for the years 1966-1970, plaintiffs successfully bid the following totals on ODOT/OTC contracts; the pretax profit and loss claimed during these years is also indicated (with losses indicated by parentheses):

YEAR	*BID AMOUNT*	*LANGENDERFER PROFIT*
1966	$314,755	$ 59,663
1967	349,812	67,140
1968	380,063	189,382
1969	237,168	85,047
1970	600,810	24,812

There is no correlation between the amount of profit reflected and the ODOT/OTC bidding and this important type of work done for these years claimed by plaintiffs to constitute the normal, non-monopoly base period. It would appear, however, that the less the amount of ODOT/OTC work done by Langenderfer, the greater was its profit. The profit realized from *non*-ODOT/OTC work is not relevant to Langenderfer's contention in this case that it is seeking damages from defendants because they illegally, through monopoly practices, deprived it of expected ODOT/OTC bids and work. We conclude, therefore, that a realistic allocation of ODOT/OTC profit for the base years would be at most one-half of the $58,353 annual profit for Langenderfer utilized by plaintiffs and their experts, or $29,177. This gives Langenderfer every reasonable favorable inference in a careful analysis of the proof.

Losses, 1973 through 1977

In the calculation of damages made by Langenderfer, three alternative calculations were offered by their accountant, Thomas Good, for the period until 1978 (the year Langenderfer went out of business), using the nearly $82,000 "base period profit" figure before taxes, which we have determined

to be unreasonable, arbitrary and speculative, and thus not allowable.

Good's first method of calculating damages for Langenderfer through 1977 resulted in a claim of $818,085; the second $536,286,[31] and the third $664,261 (the so-called "yardstick method").[32] This latter figure is not a reasonable estimation because it is based on a comparison of data not shown to be material to the relevant market. Nor can we accept, moreover, the first method utilized by Good. We do not consider it reasonable for Langenderfer to recover damages on jobs which it bid when it reasonably should have known it would realize a loss, taking into account its then known costs, direct, fixed, and variable. Good's method one, in sum, included damages for losses which Langenderfer experienced on bids which were below costs. We conclude as a matter of law the taking of a loss under these circumstances is not justifiable. Langenderfer is held to the familiar principle of minimizing its damages. We, therefore, discard a recovery based on method one.

The highest basis for damages through 1977, then, would be Good's calculation of $536,286, utilizing Langenderfer's own calculations, and utilizing the second alternative method which excluded bids that exceeded "actual costs" (and based on the $81,758 annual pretax profit figure).

Because this $536,286 figure included NOAP and was based on an inflated annual base of $81,758, an adjustment

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[31]The second method, unlike the first, eliminated bids made by Langenderfer on jobs in which concededly Langenderfer did not recover its fixed costs.

[32]This third method involved calculation of Langenderfer's "revenues on ODOT and turnpike projects for the work it performed during the period 1973 through 1977" based on "an analysis of what it would have had on those bids had it been able to bid at the levels being bid in the remainder of the state." We consider this method to be unsupported by the proof and highly conjectural.

is in order. The base figure arrived at above, $29,177, is 35.7 percent of the base figure used in plaintiffs' calculations. An appropriate award, then, for the years through 1977, is 35.7 percent of $536,286, or $191,454 (before trebling).

Losses, 1978-1987

As noted, Langenderfer sought and received a jury award including damages for the years 1978-1987 based on an annual profit figure that is not realistically supported by the evidence. Using the revised base figure arrived at above, $29,177, applied to the ten years in question,[33] Langenderfer may receive damages of $279,650 (before trebling) for the years 1978-1987.

Based on these figures, then, Langenderfer may receive damages in the amount of $191,454 for the years 1973-1977, and $279,650 for the years 1978-1987, for a total of $471,104 before trebling.

In sustaining an award for Langenderfer, we have given careful attention to defendants' market share, its comparative economic position, some evidence of anticompetitive acts, and other market factors in the asphalt paving aspect of the case as distinguished from claims of some other plaintiffs. The issues in the Langenderfer-Johnson dispute are fraught, however, with problems. Johnson chose to expand and to purchase assets and resources, some of which were, or might have been, available to Langenderfer, other plaintiffs, or to other parties. At a critical juncture, Langenderfer chose, as a matter of policy, to forego some expansion into limestone, quarrying, or sand sources within the relevant market. Langenderfer complains, nevertheless, because John-

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[33]For the last two years in question, 1986 and 1987, plaintiffs discounted their claimed damages by 17.03 percent annually. Plaintiffs' exhibit 150. We have applied the same discount to the newly calculated damage figure. For 1986, this comes to $24,931; for 1987, $21,303.

son, and all defendants, made the choice to expand and to integrate operations—asphalt paving and contracting, quarrying, sand production—and to purchase additional strategic resources, and thus defendants became able to bid more efficiently. It is only by giving Langenderfer the full benefit of presumptions and inferences that may well have been made by the jury, to the extent not proscribed by other legal principles, that we are able to sustain an award of damages in this hotly contested controversy.

Entry barriers, or the lack thereof; existence of other competition, or lessening thereof; and the very fact that government bidding at low prices over a lengthy period was at the heart of this case, all have figured into our final resolution of this complex antitrust lawsuit.

We have also considered the unusual posture of the State of Ohio in its brief as *amicus curiae* urging affirmance of the judgment of the district court with respect to monopolization "of the highway paving market in northwest Ohio." Reference was made in the *amicus* brief that defendants had an average share of the paving market from 1972 to 1985 of 58 percent and that defendants "likewise controlled the dominant share of the materials markets." We find no citation to the record or the proof, however, in support of this latter assertion, and we have concluded to the contrary. Ohio's Brief at 8 also makes the concession, citing III Kintner, Federal Antitrust Law 357-58 (1980), that "monopoly power is more likely to be found where market shares exceed 75-80%." We are prone to agree with this observation, and this market share data makes Langenderfer's case close and problematic. Ohio, in any event, takes the position that benefits of defendants' low bidding in Ohio paving contracts over many years are merely transitory and are "outweighed by the dangers of the elimination of a competitive market place." We note, however, that Ohio never sought to intervene in *Langenderfer I* or in these proceedings, and never has sought to enforce its own antitrust laws against defendants over the fifteen years

and more of their low and successful bidding, which presumably would benefit the state and its citizenry.

Taking all these factors into account, we can affirm the lesser award to Langenderfer on the evidence submitted, viewing the evidence favorably from Langenderfer's perspective, and resolving reasonable questions of damages in Langenderfer's favor.

We have adjusted the damage award in this case in light of reversal as to several plaintiffs and in order to avoid delay in further remand and hearings concerning damages as to Langenderfer. (We discuss the basis for equitable relief in this case beyond a single award of damages, costs, and redetermination of a reasonable attorney's fee in a separate section of this opinion.)

We **AFFIRM** a damage award for Langenderfer, therefore, in the amount of $471,104 before trebling.

VIII. *ATTORNEY FEES*

Insofar as attorney fees have been allowed plaintiffs and assessed against defendants by the district court based on legal services rendered for M & B, Sader, MacRitchie, and NOAP, we must set these fees aside. *See Wooldridge v. Marlene Industries,* 898 F.2d 1169 (6th Cir. 1990). Plaintiffs' attorneys may not be compensated for time spent in investigating, pursuing and litigating these claims. We must remand the case for a proper award based only on services rendered for Langenderfer with respect to a reduced judgment amount (before trebling) of $471,104 instead of $1,675,000 awarded by the jury for both Langenderfer and NOAP. We find no error in denial of the enhancement to the lodestar fee claimed by counsel for plaintiffs nor in the ten percent adjustment directed by the district court, nor in the years for which fees were found to be allowable. Neither do we find error in the setting of a lodestar rate by the district court.

IX. *INTEREST*

Upon a thorough consideration of the action of the district court with respect to disallowance of postjudgment interest claim by Langenderfer and NOAP on the original *Langenderfer I* award, we find no error in the district court's handling of this issue. The district court's decision not to allow interest on the judgment vacated in *Langenderfer I* is, we believe, clearly supported by the Supreme Court's recent decision in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S. Ct. 1570 (1990). Upon remand, the district court may award postjudgment interest in a manner consistent with *Bonjorno*.

X. *OTHER EQUITABLE RELIEF*

Finally, we generally find no error in the terms of the injunctive relief granted by the district court. A five year term is well within the bounds of the discretion of the district judge, and we will not extend the time as requested by plaintiffs. With regard to the question of divestiture, we find no basis for invocation of that doctrine with respect to acquisitions by defendants of quarrying and limestone operations or leases, a bridge contractor, or sand pit operations. Nor do we find generally a basis for divestiture of quarries or sand pits that may have been operated by asphalt plant operators or asphalt paving competitors. As to possible divestiture of Ohio Engineering, Creager, Northwest Materials, Union Quarries (as to paving operations only) and Dailey Asphalt, we construe *California v. American Stores Co.*, _ U.S. _, 110 S. Ct. 1853 (1990) to indicate, even though it was an action brought by a state, not a private party such as Langenderfer, that this potential § 16 Clayton Act remedy may apply contrary to our decision in *Langenderfer I*.[34] *American Stores*,

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[34] *Langenderfer I* held that the order of the district court which did not include divestiture, provided "no ground for assignment of error."

110 S. Ct. at 1866 & n.28, citing 2 P. Areeda & D. Turner, Antitrust Law § 328b (1978), and *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 418-427 (1st Cir. 1985). *Cia. Caribe* found fault with *I.T.T. Corp. v. G.T.E. Corp.*, 518 F.2d 913 (9th Cir. 1975), a case we cited with approval in *Langenderfer I* for concluding that divestiture was not an "available remedy in a suit instituted by a private plaintiff." 729 F.2d at 1060. *American Stores* also suggested that "equitable defenses such as laches . . . may protect consummated transactions. . . ." 110 S. Ct. at 1867. In any event, we remand for further consideration the possibility of divestiture in the limited situations in which it may be available in this case subject to equitable defenses by defendants.

We find no error in the refusal of the district court to *restrict* competition as urged by Langenderfer—to limit defendants from bidding "every other" (50 percent) contract invitation on ODOT, turnpike, and local government asphalt jobs in northwestern Ohio. Other competitors, not parties in this case, have emerged as bidders on these jobs during the relevant years, and some of them have grown in their particular markets. We find no error in the refusal to preclude defendants from future acquisitions of bridge contractors. We also find no error in the district court's decision not to enjoin defendants to charge the same prices for limestone and sand in the Toledo area as they charge for these materials in other areas of the relevant market.

Finally, we find no basis to disturb the district court's decision not to mandate that defendants charge themselves the same prices for sand, stone, and asphalt produced by their own facilities as they charge others for these materials. While defendants may not unfairly nor invidiously discriminate between customers in the same class or status, we find no error in the court's refusal to direct and control internal pricing policies among the several different entities comprising the defendants' group. *See Copperweld Corp. v. Independence*

Tube Corp., 467 U.S. 752 (1984), and *Russ' Kwik Car Wash v. Marathon Petroleum Co.*, 772 F.2d 214 (6th Cir. 1985). We note that plaintiffs and other competing parties have employed their own quarries, sandpits, and asphalt plantsas a basis for bidding competitively against others who may not have such resources, and there has been no proof one way or the other as to whether they have charged the same prices among subsidiary entities as they do with others. That NOAP has taken steps to reenter the business would indicate further such activity among plaintiff entities.

XI. *SUMMARY*

We **REVERSE** the judgments entered in this case for all plaintiffs except plaintiff Langenderfer. We **REDUCE** the amount of the judgment for Langenderfer (before trebling) to $471,104. We **REMAND** to the district court for a redetermination of reasonable attorney fees in light of our finding that the district court was not in error in its lodestar method of calculation and allowance of such fees. We find no error in denial of post-*Langenderfer I* interest.

We also **REMAND** to the district court for further consideration of possible divestiture as a part of the equitable remedy sought by Langenderfer, subject to equitable defenses presented by defendants. (We had previously determined in *Langenderfer I* that divestiture was not a proper remedy in a case brought by a private plaintiff and have reconsidered this view for the reasons indicated.)

The remands effected shall proceed in accordance with the principles herein expressed, but we entertain the hope that the parties themselves may reach agreement after considering the import of our opinion in this lengthy and expensive litigation.

JUDGMENT OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed October 29, 1990)

NOS. 87-3543/3577/3881/3882
88-3126/3127
88-3574/3651

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs-Appellants (87-3881/88-3126),
Cross Appellees (87-3882/88-3127),
Plaintiffs-Appellees (87-3543/88-3574),
Cross Appellants (87-3577),

G.M. SADER EXCAVATING & PAVING, INC.,
Plaintiff-Appellee (88-3574/88-3651),
Cross Appellant (88-3651),

v.

S.E. JOHNSON COMPANY, *et al.*,
Defendants-Appellants (87-3543/88-3574),
Cross Appellees (87-3577/88-3651),
Defendants-Appellees (87-3881/88-3126),
Cross Appellants (87-3882/88-3127,

STONECO, INC.; SAXTON DEVELOPMENT COMPANY; J.T. KIRBY,
Defendants-Appellants (88-3574/3651),
Cross Appellees (88-3651).

Before: MARTIN and WELLFORD, *Circuit Judges;* and LIVELY, *Senior Circuit Judge.*

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CASE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgments of the said district court in this case be and the same are reversed for all plaintiffs except plaintiff Langenderfer. The amount of judgment for Langenderfer (before trebling) is reduced to $471,104. IT IS FURTHER ORDERED that the case is remanded for further proceedings in accordance with the principles herein expressed.

Each party bears its own costs on appeal.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN, *Clerk*

ISSUED AS MANDATE: February 12, 1991
COSTS: (Awarded to appellee-cross-appellant)

FEES:	$525.00
PRINTING:	$364.00
TOTAL:	$889.00

JURY'S ANSWERS TO SPECIAL INTERROGATORIES AND GENERAL VERDICTS FOR PLAINTIFFS

(Filed October 1, 1986)

Civil Action No. C-76-425
Civil Action No. C-83-1144

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

v.

S. E. JOHNSON COMPANY, *et al.*,
Defendants.

JUDGE JOHN W. POTTER

WRITTEN INTERROGATORIES AND ANSWERS TO BE RETURNED WITH THE GENERAL VERDICTS

We, the jury, hereby return answers to the following interrogatories numbered 1 through 18.

RELEVANT MARKET

1. Is there a relevant product market consisting of limestone used in ODOT and OTC asphalt paving contracts?

YES __X__ NO _____

If your answer is "yes", did one or more of the Plaintiffs compete in this market. Check your answer.

	YES	*NO*
Arthur S. Langenderfer, Inc. and Northern Ohio Asphalt Paving Co.	X	
MacRitchie Materials, Inc.	X	
M & B Asphalt Co., Inc.	X	
G.M. Sader Excavating & Paving, Inc.		X

2. Is there a relevant product market consisting of sand used in ODOT and OTC asphalt paving contracts?

YES __X__ NO _____

If your answer is "yes", did one or more of the Plaintiffs compete in this market. Check your answer.

	YES	*NO*
Arthur S. Langenderfer, Inc. and Northern Ohio Asphalt Paving Co.	X	
MacRitchie Materials, Inc.	X	
M & B Asphalt Co., Inc.	X	
G.M. Sader Excavating & Paving, Inc.		X

3. Is there a relevant product market consisting of asphalt used in ODOT and OTC asphalt paving contracts?

YES X NO _____

If your answer is "yes", did one or more of the Plaintiffs compete in this market. Check your answer.

	YES	*NO*
Arthur S. Langenderfer, Inc. and Northern Ohio Asphalt Paving Co.	X	
MacRitchie Materials, Inc.	X	
M & B Asphalt Co., Inc.	X	
G.M. Sader Excavating & Paving, Inc.		X

4. Is there a relevant product market consisting of both ODOT and OTC asphalt paving contracts?

YES X NO _____

If your answer is "yes", did one or more of the Plaintiffs compete in this market. Check your answer.

	YES	*NO*
Arthur S. Langenderfer, Inc. and Northern Ohio Asphalt Paving Co.	X	
MacRitchie Materials, Inc.	X	
M & B Asphalt Co., Inc.	X	
G.M. Sader Excavating & Paving, Inc.		X

5. Is there a relevant product market consisting of ODOT asphalt paving contracts only?

YES X NO _____

If your answer is "yes", did one or more of the Plaintiffs compete in this market. Check your answer.

	YES	*NO*
Arthur S. Langenderfer, Inc. and Northern Ohio Asphalt Paving Co.	X	
MacRitchie Materials, Inc.	X	
M & B Asphalt Co., Inc.	X	
G.M. Sader Excavating & Paving, Inc.		X

Is there a relevant product market consisting of OTC asphalt paving contracts only?

YES X NO _____

If your answer is "yes", did one or more of the Plaintiffs compete in this market. Check your answer.

	YES	*NO*
Arthur S. Langenderfer, Inc. and Northern Ohio Asphalt Paving Co.	X	
MacRitchie Materials, Inc.	X	
M & B Asphalt Co., Inc.	X	
G.M. Sader Excavating & Paving, Inc.		X

6. Do you find a relevant geographic market or submarket for one or more of the Plaintiffs.

	YES	*NO*
Arthur S. Langenderfer, Inc. and Northern Ohio Asphalt Paving Co.	X	
MacRitchie Materials, Inc.	X	
M & B Asphalt Co., Inc.	X	
G.M. Sader Excavating & Paving, Inc.	X	

7. State the relevant market or submarket of each Plaintiff checked in your prior answer.

The relevant market of ASL, MM (MacRitchie Materials, Inc.), M&B & Sader is the 13 counties. [handwritten]

Answer the remaining questions only if you have found at least one relevant product market and a relevant geographic market for at least one of the Plaintiffs.

SHERMAN ACT SECTION 2

A. *Actual Monopolization*

8. Do Defendants have monopoly power, that is, the power to control prices or exclude competition in any of the relevant markets as alleged by Plaintiffs?

(Check the market or markets you have found to exist and then answer this question only as to such market or markets):

____ In a relevant market consisting of limestone used in ODOT and OTC asphalt paving contracts?

YES __X__ NO _____

____ In a relevant market consisting of sand used in ODOT and OTC asphalt paving contracts?

YES __X__ NO _____

____ In a relevant market consisting of asphalt used in ODOT and OTC asphalt paving contracts?

YES __X__ NO _____

____ In a relevant market consisting of ODOT and OTC asphalt paving contracts?

YES __X__ NO _____

____ In a relevant market consisting of ODOT asphalt paving contracts only?

YES __X__ NO _____

____ In a relevant market consisting of OTC asphalt paving contracts only?

YES __X__ NO _____

Answer question 9 only if you have answered "yes" to one or more parts of question 8.

9. Did Defendants willfully acquire, maintain or use monopoly power through anticompetitive conduct in any of the relevant markets?

(Check the market or markets you have found to exist and then answer this question only as to such market or markets):

____ In a relevant market consisting of limestone used in ODOT and OTC asphalt paving contracts?

YES ___X___ NO _____

____ In a relevant market consisting of sand used in ODOT and OTC asphalt paving contracts?

YES ___X___ NO _____

____ In a relevant market consisting of asphalt used in ODOT and OTC asphalt paving contracts?

YES ___X___ NO _____

____ In a relevant market consisting of ODOT and OTC asphalt paving contracts?

YES ___X___ NO _____

____ In a relevant market consisting of ODOT asphalt paving contracts only?

YES ___X___ NO _____

In a relevant market consisting of OTC asphalt paving contracts only?

YES ___X___ NO _____

Answer question 10 only if you have answered "yes" to one or more parts of question 9.

10. State the anticompetitive conduct found in answer 9 (describe one or more types of conduct as alleged by Plaintiffs as briefly as possible but use as much space as necessary).

The acquisitions were all made to exclude &/or injure competition, and increase Johnson's power which he succeeded in doing. [handwritten]

Answer question 11 only if you have given at least one "yes" response to question 9.

1. Did Defendants' monopolization of any of the relevant markets cause injury to the business or property of one or more of the Plaintiffs?

YES X NO _____

Answer question 12 only if you have answered "yes" to question 11.

12. Check below which Plaintiff or Plaintiffs you have found suffered injury to their business or property as a result of Defendants' monopolization of any of the relevant markets.

	INJURED	*NOT INJURED*
Arthur S. Langenderfer, Inc. and Northern Ohio Asphalt Paving Co.	X	
MacRitchie Materials, Inc.	X	
M & B Asphalt Co., Inc.	X	
G.M. Sader Excavating & Paving, Inc.	X	

B. Attempted Monopolization

13. Did Defendants have a specific intent to achieve a monopoly in any of the relevant markets?

(Check the market or markets you have found to exist and then answer this question only as to such market or markets):

____ In a relevant market consisting of limestone used in ODOT and OTC asphalt paving contracts?

YES ___X___ No _____

____ In a relevant market consisting of sand used in ODOT and OTC asphalt paving contracts?

YES ___X___ NO _____

____ In a relevant market consisting of asphalt used in ODOT and OTC asphalt paving contracts?

YES ___X___ NO _____

____ In a relevant market consisting of ODOT and OTC asphalt paving contracts?

YES ___X___ NO _____

____ In a relevant market consisting of ODOT asphalt paving contracts only?

YES ___X___ NO _____

____ In a relevant market consisting of OTC asphalt paving contracts only?

YES ___X___ NO _____

Answer question 14 only if you have answered "yes" to question 13.

14. Did Defendants engage in anticompetitive conduct in order to achieve a monopoly?

YES ___X___ NO _____

Answer question 15 only if you answered "yes" to question 14.

15. Was there a dangerous probability that Defendants would achieve a monopoly?

YES X NO _____

Answer question 16 only if you have answered "yes" to question 15.

16. Did Defendants' attempt to monopolize cause injury to the business or property of one or more of the Plaintiffs?

YES X No _____

Answer question 17 only if you have answered "yes" to question 16.

17. Check below which Plaintiff or Plaintiffs suffered injury to their business or property as a reuslt of Defendants' attempt to monopolize.

	INJURED	*NOT INJURED*
Arthur S. Langenderfer, Inc. and Northern Ohio Asphalt Paving Co.	X	
MacRitchie Materials, Inc.	X	
M & B Asphalt Co., Inc.	X	
G.M. Sader Excavating & Paving, Inc.	X	

Answer question 18 only if you have checked one or more Plaintiffs in your answers to questions 17 and/or 12.

18. Check below which Plaintiffs, if any, incurred money damages as a result of an antitrust injury and state the amount of money damages where applicable.

	DAMAGED	*DOLLARS*
Arthur S. Langenderfer, Inc. and Northern Ohio Asphalt Paving Co.	X	$1,675,000.00
MacRitchie Materials, Inc.	X	$2,000,000.00
M & B Asphalt Co., Inc.	X	$350,000.00
G.M. Sader Excavating & Paving, Inc.	X	$250,000.00

Each juror, concurring in the foregoing answers, signs below and attests that the answers to interrogatories as marked herein are true and correct.

Janet Hart
Irma P. Chitwood
Betty Cherry
Ruth Williams
Lori Jo Traver
Joanne M. Pore
James E. Whyde
Foreperson

Toledo, Ohio
October 1, 1986

Case No. C 76-425
C 83-1144

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

vs.

S.E. JOHNSON COMPANY, *et al.*,
Defendants.

VERDICT

We, the Jury, in the above-entitled action, on the issues joined, find for the plaintiffs, Arthur S. Langenderfer, Inc. and Northern Ohio Asphalt Paving Co. against the defendants, and to said plaintiff award damages in the amount of:

One million six hundred seventy five thousand dollars ($1,675,000.00)

Lori Jo Traver
Joanne M. Pore
Irma P. Chitwood
Betty Cherry
Ruth Williams
Janet Hart
James E. Whyde

Case No. C 76-425
C 83-1144

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

vs.

S.E. JOHNSON COMPANY, *et al.*,
Defendants.

VERDICT

We, the Jury, in the above-entitled action, on the issues joined, find for the plaintiff, G.M. Sader Excavating & Paving Inc., against the defendants, and to said plaintiff award damages in the amount of:

Two hundred fifty thousand dollars ($250,000.00)

Lori Jo Traver
Joanne M. Pore
Irma P. Chitwood
Betty Cherry
Ruth Williams
Janet Hart
James E. Whyde

Case No. C 76-425
C 83-1144

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

vs.

S.E. JOHNSON COMPANY, *et al.*,
Defendants.

VERDICT

We, the Jury, in the above-entitled action, on the issues joined, find for the plaintiff, MacRitchie Materials, Inc. against the defendants, and to said plaintiff award damages in the amount of:

Two hundred thousand dollars ($200,000.00)

Lori Jo Traver
Joanne M. Pore
Irma P. Chitwood
Betty Cherry
Ruth Williams
Janet Hart
James E. Whyde

Case No. C 76-425
C 83-1144

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

vs.

S.E. JOHNSON COMPANY, *et al.*,
Defendants.

VERDICT

We, the Jury, in the above-entitled action, on the issues joined, find for the plaintiff, M & B Asphalt Co., Inc., against the defendants, and to said plaintiff award damages in the amount of:

Three hundred fifty thousand dollars ($350,000.00)

Lori Jo Traver
Joanne M. Pore
Irma P. Chitwood
Betty Cherry
Ruth Williams
Janet Hart
James E. Whyde

JUDGMENT OF TRIAL COURT

(Filed October 2, 1986)

Case No. C 76-425

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

vs.

S. E. JOHNSON COMPANY, *et al.*,
Defendants.

JUDGMENT

POTTER, *J.*:

This action came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its general verdict unanimously in favor of plaintiffs and answers to special interrogatories as follows: for plaintiffs Arthur S. Langenderfer, Inc. and Northern Ohio Asphalt Paving Co. and against defendants for the sum of $1,6[57],000.00 [sic]; for plaintiff MacRitchie Materials, Inc. and against defendants for the sum of $200,000.00; for plaintiff M & B Asphalt Paving Co., Inc. and against defendants for the sum of $350,000.00; and for plaintiff G. M. Sader Excavating & Paving, Inc. and against defendants for the sum of $250,000.00; upon which judgment is entered October 2, 1986, now, therefore,

IT IS ORDERED AND ADJUDGED, in accordance with 15 U.S.C. §15 that plaintiffs recover of defendants threefold the damages sustained, to wit:

1. Plaintiffs Arthur S. Langerderfer Inc. and Northern Ohio Asphalt Paving Co. recover from defendants the sum of Five Million Twenty-Five Thousand Dollars ($5,025,000.00);

2. Plaintiff MacRitchie Materials, Inc. recover from defendants the sum of Six Hundred Thousand Dollars ($600,000.00);

3. Plaintiff M & B Asphalt Paving Co., Inc. recover from defendants the sum of One Million Fifty Thousand Dollars ($1,050,000.00);

4. Plaintiff G. M. Sader Paving & Excavating Co. recover from defendants the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00);

with interest thereon from the date hereof until paid at the annual rate of 5.79% as provided by law and plaintiffs' costs of this action.

IT IS FURTHER ORDERED that plaintiffs shall have until November 3, 1986 to file herein an application for their cost of suit, including reasonable attorney's fees, as well as an application for injunctive or remedial relief to which plaintiffs claim they may be entitled; and defendants are hereby granted until December 1, 1986 to respond.

/s/ JOHN W. POTTER
United States District Judge

MEMORANDUM AND ORDER OF THE TRIAL COURT DENYING DEFENDANTS' MOTION FOR J.N.O.V. OR NEW TRIAL

(Filed April 30, 1987)

Case No. C 76-425

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

vs.

S. E. JOHNSON, COMPANY, *et al.*,
Defendants.

MEMORANDUM AND ORDER

POTTER, *J.*:

On April 20, 1987, this matter came to be heard on defendants' motion for judgment notwithstanding the verdict or, in the alternative, for new trial. The parties have extensively briefed this matter. Defendants filed the motion, plaintiffs filed opposition, then with leave of court defendants replied, defendants filed a supplemental memorandum, plaintiffs replied, and defendants filed a supplemental reply.

When considering defendants' motion, the evidence must be viewed in the light most favorable to plaintiffs. *Miller v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 203 F. Supp. 107, 110 (E.D. Tenn. 1962), *aff'd*, 317

F.2d 693 (6th Cir. 1963). When ruling on a motion for a new trial, "[t]he trial judge . . . should . . . abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice." 6A J. Moore & J. Lucas, *Moore's Federal Practice*, 59.08[5] (2d ed. 1956) (footnote omitted); *Duncan v. Duncan*, 377 F.2d 49, 52 (6th Cir.), *cert. denied*, *Fain v. Duncan*, 389 U.S. 913 (1967). After reviewing the parties' briefs and hearing oral argument, the Court determines that there has been no miscarriage of justice. Therefore, defendants' motion for a new trial is not well taken.

"A judgment n.o.v. may not be granted unless reasonable minds could not differ as to the conclusion to be drawn from the evidence." *Gillham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976). Based on the answer to Special Interrogatory No. 10 (No.10) defendants contend that the jury did not find defendants to have engaged in any anticompetitive conduct. Therefore, since reasonable minds could not differ as to the conclusion, defendants contend that as a matter of law, defendants' motion for judgment n.o.v. is proper.

The jury was asked:

> Question 10—State the anticompetitive conduct found in answer 9 (describe one or more types of conduct as alleged by Plaintiffs as briefly as possible but use as much space as necessary).
>
> Answer—The acquisitions were all made to exclude and/or injure competition and increase Johnson's power which he succeeded in doing.

The Court's jury instructions (Instructions) stated:

> Plaintiffs contend that defendants have willfully abused their monopoly power by engaging in the following anticompetitive conduct:
>
> 1. Monopolistic stone pricing;
>
> 2. Price or profit squeezing and cross—subsidization;
>
> 3. Leveraging its position in ODOT and OTC;
>
> 4. Tying the sale of stone and sand to the sale of asphalt;
>
> 5. Intimidating, discouraging, coercing and retaliating against competitors;
>
> 6. Refusal to sell stone to Sader;

Instructions at 18.

Defendants contend that since the jury did not specifically list any of these anticompetitive acts, plaintiffs have failed to establish antitrust injury.[1] Therefore, defendants' claim that the jury had to find a violation of the antitrust laws based on defendants bidding below its competitors but above its own cost contrary to the holding in *Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.*, 729 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984).

In *Langenderfer*, the Sixth Circuit stated that "*Brunswick* requires that Langenderfer's injury result either from a lessening of competition due to the acquisitions or from anticompetitive acts made possible

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[1] Defendants claim *Cargill, Inc. v. Monfort of Colorado*, 55 U.S.L.W. 4027 (Dec. 9, 1986) is instructive on the requirement for antitrust injury. Although the Court agrees that *Monfort* is instructive, the Court determines that *Monfort* merely relies on and reaffirms the principles regarding antitrust injury as enunciated in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

by the acquisitions" and "whether Langenderfer's injuries resulted from 'anticompetitive acts made possible' by the acquisitions was properly a jury question." *Id.* at 1058-59. The answer to No. 10 does not require a determination by this Court that as a matter of law, defendants did not engage in anticompetitive acts thereby causing plaintiffs to suffer any antitrust injury.[2]

The Court must attempt to reconcile the answers to interrogatories with the jury's verdict when "there is a view of the case that makes the jury's answers to special interrogatories consistent." *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963). The Court must construe the answer to No. 10 as a finding that defendants did engage in the anticompetitive conduct as set out in the Court's instructions thereby reconciling a possible inconsistent interpretation of No. 10 with the general verdict. Therefore, the Court determines that as to all plaintiffs except Sader, defendants' motion for judgment n.o.v. is not well taken.[3]

In substance Sader

> claims that defendants' decision to revoke his credit privileges is unreasonably anticompetitive conduct in retaliation for his testimony at the first trial and to injure him as a competitior, and that this decision

[2] Defendants do not contend that the jury was improperly instructed regarding anticompetitive conduct or the necessity of antitrust injury. Therefore, the Court will assume, as it must, that the jury followed the Court's instruction. *Aspen Skiing Co. v. Aspen Highlander Skiing Corp.*, 472 U.S. 585, 604 (1985).

[3] The Court is aware defendants argue the evidence does not support a finding that Sader, M & B or MacRitchie Materials competed throughout the thirteen county area. However, applying the standard for the granting of a motion for judgment n.o.v., the Court is not convinced that reasonable minds could reach only one conclusion and that conclusion is contrary to the jury's verdict. Therefore, the Court determines that defendants' second contention is not well taken.

> amounted to a refusal to deal. Defendants contend that they had valid business reasons justifying the revocation of Sader's credit and that Sader could still purchase C.O.D. or on another customer's account.
>
> You must first decide whether you find that the decision to revoke credit is a refusal to deal. In this regard, . . . a customer does not have the right to dictate the terms on which he will purchase.
>
> The law does not require a supplier, even if it has monopoly power, to sell on credit to a customer where the supplier has legitimate business reasons to terminate the customer's credit. If you find that this was a refusal to deal and that defendants had no legitimate business reasons for revoking Sader's credit, then you may find for plaintiff Sader on this issue.

Instruction at 21.

Sader is a paving contractor. Sader and defendants competed for work which included paving streets, driveways and parking lots for local governments, private and commercial customers. Absent a valid business reason, equal access is required for everyone when a competitor "control[s] an indispensible facility which cannot be easily duplicated." *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 858 (6th Cir. 1979). Since defendants controlled the Portage quarry and defendants would no longer extend Sader credit, Sader was required to obtain his supplies from elsewhere. As the Sixth Circuit recognized, this case presented a situation where "[t]he practical service area . . . [was] limited to a 25-30 mile radius due to hauling costs and the need to deliver the product at specified temperatures." *Langerderfer*, 729 F.2d at 1054 n.4.

Furthermore, defendants contend that plaintiffs' statistical evidence is insufficient, as a matter of law, to establish the existence of a monopoly in violation of Sherman 2. However, due to the factual setting of this proceeding, defendants' statistical analysis is not conclusive.

> The trend of guidance from the Supreme Court and the practice of most courts endeavoring to follow that guidance has been to give only weight and not conclusiveness to market share evidence. . . . [T]he Supreme Court recognized that exclusive focus on market share percentages can produce a distorted picture of market power because "the relative effect of percentage command of a market varies with the setting in which that factor is placed." The Court said that a true picture emerges only from consideration of additional market characteristics, among them, the strength of the competition, the probable development of the industry, and consumer demand.

Broadway Delivery Corp. v. United Parcel Service of America, Inc., 651 F.2d 122, 128 (2d Cir.) *cert. denied*, 454 U.S. 968 (1981)(quoting *United States v. Columbia Steel Co.*, 334 U.S. 495, 527-28 (1948)).

Since the strength of the competition, the probable development of the industry, consumer demand and market share are all factors to consider, the factual determination as to defendants' market power was properly a jury question. The Court determines under the appropriate standard for a judgment n.o.v. that reasonable minds could differ as to the conclusion to be drawn from the evidence. Therefore, defendants' motion for judgment n.o.v. as to Sader is not well taken.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendants' motion for judgment notwithstanding the verdict or, in the alternative, for new trial be, and hereby is, DENIED.

/s/ JOHN W. POTTER
United States District Judge

MEMORANDUM AND ORDER OF THE TRIAL COURT RE POST-JUDGMENT INTEREST

(Filed August 13, 1987)

Case No. C 76-425

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

vs.

S. E. JOHNSON COMPANY, *et al.*,
Defendants.

MEMORANDUM AND ORDER

POTTER, *J.*:

This matter is before the Court on plaintiffs' motion to alter or amend the rate of interest on judgment, defendants' opposition, plaintiffs' reply and defendants' supplemental response in opposition. Pursuant to the applicable statute, 28 U.S.C. §1961,[1] plaintiffs contend that they are entitled to interest on the treble damage judgment awarded in the original jury trial. Specifically, plaintiffs contend that they are entitled to interest on $2,946,351.00 from April 2, 1980 to July 30, 1980 at a rate of 6% per annum at 8% per annum from July

[1] On April 2, 1980, 28 U.S.C. §1961 established interest rates on federal district court judgments at the rate allowable under state law. The relevant Ohio interest provision is Ohio Rev. Code §1343.03.

31, 1980 to July 4, 1982 and thereafter at 10% per annum until judgment is satisfied.[2] Defendants contend that where a judgment is vacated and a new trial is held interest runs from the post-remand judgment.

Plaintiffs rely on *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985), for the proposition that the date of the original judgment, even though vacated and remanded, should establish the date of liability for purposes of post-judgment interest. *Id.* at 1299. Further, plaintiffs assert that the Sixth Circuit adopted this analysis in *United States v. Bank of Celina*, 786 F.2d 1166 (6th Cir. 1986) (published without opinion; unpublished opinion available LEXIS Genfed library, USAPP file).

The precedent relied upon by both *Handgards* and *Celina* is *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980). In *Mt. Hood*, the court allowed interest to run from the date the judgment was originally entered in the district court when on remand "[t]he judgment remains the same—in the same amount, for the same damages incurred during the same period." *Id.* at 407. The Sixth Circuit held that

> it is clear that when a judgment is *modified* on appeal, interest accrues from the date of the district court's judgment, rather than the appellate court's judgment. The result should be no different when the district court reaffirms its own original judgment, since the underlying rationale for the ruling is that the date of the original judgment is controlling because that was when the correct award should

[2] The Ohio statutory rate was amended effective July 30, 1980 from 6% to 8% per annum and from 8% to 10% per annum effective July 5, 1982.

> have been entered. The fact that a district court's judgment *was modified* does not result in an entire new judgment.

Celina at 5 (Lexis, Genfed library, USAPP file (emphasis added).

Under 28 U.S.C. §1961, "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court. Such interest shall be calculated from the date of the entry of the judgment." 28 U.S.C. §1961 (Supp. 1987). In *Arthur S. Langerderfer, Inc. v. S. E. Johnson Co.*, 729 F.2d 1050 (6th Cir.) *cert. denied*, 469 U.S. 1036 (1984), the Sixth Circuit vacated and remanded this case for a retrial. *Id.* at 1060. Since a vacated judgment is nugatory, *Riha v. International Telephone & Telegraph Corp.*, 533 F.2d 1053, 1054 (8th Cir. 1976), "interest does not accrue on a vacated judgment." *Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 476 (8th Cir. 1977) (citing *Riha v. International Telephone & Telegraph Corp.*, 533 F.2d 1053 (8th Cir. 1976). When "a judgment in favor of plaintiff is vacated on appeal and, upon remand, a new trial is held resulting in a verdict and judgment for plaintiff, the date referred to in section 1961 is the date of the entry of the judgment after the new trial on remand." *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 754 (9th Cir. 1983) (citing *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335, 336 (10th Cir. 1979), *cert. denied* 446 U.S. 936 (1980).

Although plaintiffs contend that *Handgards* is applicable in this case, the Sixth Circuit in *Celina* did not adopt the rational [sic] of *Handgards*. Since the judgment in this case was not modified on appeal, not for the same amount and not for the same period, *Celina*, *Mt. Hood*, and *Handgards* are not dispositive of this

proceeding. Because the original judgment was vacated and remanded, thereby rendering the original judgment nugatory, the date of the entry of judgment is the date of the post-remand judgment, not the original judgment.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that plaintiffs' motion to amend or alter the rate of interest be, and hereby is, DENIED.

/s/ JOHN W. POTTER
United States District Judge

MEMORANDUM AND ORDER OF TRIAL COURT RE ATTORNEY'S FEES AND COSTS

(Filed January 11, 1988)

Case No. C 76-425

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

vs.

S. E. JOHNSON COMPANY, *et al.*,
Defendants.

MEMORANDUM AND ORDER

POTTER, *J.*:

This matter is before the Court on plaintiffs' application and supplemental application for award of attorney's fees and costs. Both parties have thoroughly briefed the issues presented by plaintiffs' application and supplemental application. On June 2, 1987, this Court heard oral argument on these issues.

Plaintiffs seek an award of attorney's fees and costs totalling $2,944,727.66. This amount includes a request attorney's fees of $2,539,125.62 for time spent by plaintiffs' attorneys for discovery, trial, appeal and retrial of the case from 1976 through April 30, 1987, and $405,602.04 for costs of suit for the same time period.

Because of the extensive nature of this litigation, it is necessary to briefly outline the procedural history of this case. The original action (Langenderfer I) was commenced on August 26, 1976 by plaintiffs A. S. Langenderfer, Inc. and Northern Ohio Asphalt Paving, Inc. to recover treble damages and injunctive relief against defendants for monopolization of asphalt paving in Northwestern Ohio in violation of the antitrust laws. Langenderfer I was tried to a jury in March, 1980. The jury unanimously found for plaintiffs and against defendants and returned a general verdict for $982,117.00. After denying defendants' motions for judgment notwithstanding the verdict or a new trial, the Court entered a treble judgment of $2,946,351.00 plus attorney's fees of $344,544.57 and costs of $18,559.90. Defendants filed a timely appeal.

On March 15, 1984, the Sixth Circuit vacated the judgment and remanded the case for retrial. *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir.) *cert. denied*, 469 U.S. 1036 (1984). In vacating the judgment, the Sixth Circuit recognized that "the evidence presented at trial clearly focused on the claim of predatory pricing." *Id.* at 1055 (footnote omitted). However, since the evidence did not establish that defendants had charged prices below their total cost for the product sold, "the trial court erred by failing to grant a directed verdict in favor of defendants on the issue of predatory pricing." *Id.* On November 26, 1984, the Supreme Court denied certiorari.[1]

While the appellate decision was pending in Langenderfer I, the original plaintiffs joined by MacRitchie Materials, Inc., M & B Asphalt, Inc. and G.

[1] It appears that both parties petition for certiorari and that the Supreme Court denied both petitioners. See *S.E. Johnson Co. v. Arthur S. Langenderfer, Inc.*, 469 U.S. 1036 (1984) and *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 469 U.S. 1036 (1984).

M. Sader Excavating and Paving, Inc. filed a second case (Langenderfer II) on December 23, 1983. Langenderfer II alleged that defendants had engaged in the same monopolistic and antitrust conduct as alleged in Langenderfer I. On November 6, 1985, this Court ordered the cases consolidated for jury trial. The Court set August, 1986 for trial.

Following a six week trial, a unanimous jury, after answering special interrogatories, returned a verdict in favor of all plaintiffs and against defendants. On October 2, 1986, this Court entered a total treble judgment of $7,425,000.00. On April 30, 1987, the Court denied defendants' motions for judgment notwithstanding the verdict or a new trial. Thereafter, on August 13, 1987, this Court entered an injunction against defendants.

In accordance with Section 4 of the Clayton Act, 15 U.S.C. §15, plaintiffs seek an award of attorney's fees. The statute provides in part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. §15(a) (Supp. 1987). Therefore, this statute in connection with the other fee-shifting statutes entitles a prevailing litigant to the recovery of its reasonable attorney's fees. However, the Supreme Court has cautioned that:

> [t]hese statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statute was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws.

Pennsylvania v. Delaware Valley Citizens Council For Clean Air, 106 S. Ct. 3088, 3098 (1986).

Northcross v. Board of Education of the Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), is the controlling authority for awards of attorney's fees in the Sixth Circuit. Although the court in *Northcross* was construing 42 U.S.C. §1988 of the Civil Rights Attorney's Fees Award Act of 1976, the Sixth Circuit recognized the legislative history as intending that "[t]he amount of fees is to be governed 'by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases.' " *Id.* at 633 (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 6 *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5913). Therefore, *Northcross* does provide guidance for the award of attorney's fees in antitrust litigation.

In *Northcross*, the Sixth Circuit utilized the lodestar approach for calculating reasonable attorney's fees. Thereafter, the Supreme Court endorsed this method in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Court held that "the most useful starting point for determining the amount of a reasonable fee is the number of hours *reasonably* expended on the litigation multiplied by a *reasonable* hourly rate. . . . The party seeking an award of fees should submit evidence supporting the hours worked and the rates claimed." *Id.* at 433 (emphasis added).

In determining the number of hours reasonably expended on this litigation, the Court must address plaintiffs' request to include the time spent on the first trial, appeal and petition for certiorari in Langenderfer I. Plaintiffs rely on *Hasbrouck v. Texaco, Inc.*, 631 F. Supp. 258 (E.D. Wash. 1988), *aff'd*, 830 F.2d 1513 (9th Cir. 1987), as authority for the award of attorney's fees

in Langenderfer I's first trial, appeal and petition for certiorari. However, *Hasbrouck* is factually distinguishable from the present proceeding. In *Hasbrouck*, although plaintiffs' jury verdict was reversed when the trial court granted judgment n.o.v., plaintiffs were successful at the appellate level and at the subsequent retrial.

The Sixth Circuit expressly considered Langenderfer I as clearly focusing on the claim of predatory pricing. *Langenderfer*, 729 F.2d at 1055. The Supreme Court has held that "[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of reasonable fees." *Hensley*, 461 U.S. at 446. Therefore, the original award of attorney's fees in the amount of $344,544.57 will not be reinstated. Furthermore, plaintiffs claim a total of 1508.5 hours for services rendered between June 1, 1980 and June 30, 1985.[2] An examination of plaintiffs' Exhibits 3A, 3B and 3C reveal 1275.25 hours spent on matters related to plaintiffs' unsuccessful appeal or petition for certiorari. Therefore, for the period between June 1, 1980 and June 30, 1986 plaintiffs will be compensated only for 233.25 hours.[3]

During the period of July 1, 1985 through April 30, 1987, plaintiffs seek compensation for 8,502.25 hours.[4] During this period approximately forty partners,

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[2] The total hours of 1508.5 represents 900.5 partner hours, 569.00 associate hours, and 39.00 paralegal hours.

[3] The total hours of 233.25 represent 208.75 partner hours and 24.5 associate hours.

[4] This figure reflects a 2.00 hour adjustment from the hours claimed in plaintiffs' supplemental application. Between October 3, 1986 and April 30, 1987 plaintiffs claimed 1015.50 hours were spent on matters related to this litigation. However, this computation is incorrect, and

(Footnote continued on following page.)

associates, summer associates and paralegals worked on this case. This Court determines that this is "too many hours of too many attorneys." *In Re Fine Paper Antitrust Litigation*, 751 F.2d 562, 598 (3rd Cir. 1984). Plaintiffs' counsel has an obligation to exercise "billing judgment," thereby excluding "from a fee request hours that are excessive, redundant, or otherwise unnecessary . . ." *Hensely*, 461 U.S. at 434. However, plaintiffs' counsel has not fulfilled this obligation.

The Sixth Circuit has "approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services." *Northcross*, 611 F.2d at 636-37 (citing *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714 (6th Cir. 1978)). In *Northcross*, the court reduced the total fees by 5% because of the limited number of attorneys involved in the case. However, the use of approximately forty attorneys and support staff requires a deduction of 10%. See *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714 (6th Cir. 1978); *Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1275, 1286-87 (N.D. Ohio 1985) (5% reduction for use of four lawyers at trial level). The Court realizes that plaintiffs' counsel allegedly spent approximately 1000 hours in preparation of post-trial materials. Although the Court recognizes that the Sixth Circuit has upheld reductions of 25% and 50%, this Court determines that a reduction of 10% for post-trial hours is adequate. Therefore, the total hours of 8735.50 will be reduced by 10%.

(Footnote continued from preceding page.)

the correct number of hours is 1013.50. Plaintiffs contend that Carol Wisniewski worked 57.25 on this litigation. However, the time sheets only reflect 55.75 hours work. Furthermore, the addition of the total hours is incorrect. Therefore, the Court is subtracting .50 hours to correct this mathematical error.

Once the total hours expended is calculated, the Court must establish a reasonable hourly rate. Plaintiffs have requested that their historical hourly rates be used in the calculation of attorney's fees. Plaintiffs have submitted affidavits from Leslie W. Jacobs, a partner with Thompson, Hine and Flory of Cleveland, and H. Stephen Madsen, a partner with Baker & Hostetler of Cleveland. These affidavits state that the historical rates of $120 and $220 per hour for partners, $51 to $130 per hour for associates, $37 to $70 per hour for paralegals, and $47 to $51 per hour for summer clerks represents a reasonable hourly rate for services rendered. However, plaintiffs seek to have these rates enhanced by 120%. According to plaintiffs, the 120% enhancement is required because plaintiffs' attorneys' law firm instituted a policy of charging a premium rate for complex litigation. Therefore, the rate charged is 120% of the normal hourly rates charged by the firm. Plaintiffs have not submitted any evidence that this 120% enhancement is reasonable. Therefore, in the exercise of this Court's discretion, plaintiffs' hourly rate will not be enhanced by 120%.

Although plaintiffs' affidavits suggest that the historical hourly rates should be used, this Court determines and defendants agree that current billing rates are more appropriate. "Using current market rates to calculate the lodestar may counterbalance the delay in payment as well as simplify the task of the district court." *Daly v. Hill*, 790 F.2d 1071, 1081 (4th Cir. 1988) (quoting *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983). By compensating the attorney at current rates, not historic rates, the Court takes into account the effect of inflation, foregone interest and delay in payment. *Daly*, 790 F.2d at 1081. Therefore, plaintiffs' reasonable hourly rate will be the current hourly rate.

Although plaintiffs seek an hourly rate based on the hourly rates for Cleveland attorneys, this Court must adhere to the law of the Supreme Court and Sixth Circuit, and calculate a reasonable hourly rate "according to the prevailing market rates in the relevant community." *Akron Center*, 604 F. Supp. at 1280. In *Blum v. Stenson*, 465 U.S. 886 (1984), the Court held that " 'reasonable fees' under §1988 are to be calculated according to the prevailing market rates in the relevant community." *Id.* at 895; see also *Northcross*, 611 F.2d at 368.

Relying upon the opinion of Attorney Zraik, plaintiffs' original local counsel, plaintiffs contend that each of the five Toledo firms which could have handled the case had a conflict problem. However, plaintiffs present no evidence that any of these firms were contacted or approached regarding the possible representation of plaintiffs in this proceeding. The Court determines that plaintiffs have not shown that they were "unable through diligent, good faith efforts to retain local counsel." *Donaldson v. O'Connor*, 454 F. Supp. 311, 315 (N.D. Fla. 1978). Therefore, the relevant community for the calculation of a prevailing hourly rate is Toledo.

The only evidence offered on reasonable rates in Toledo is set forth in the affidavits of Messrs. Mattimoe and Jamra. These affidavits establish a maximum hourly rate of $135.00 for senior partners in complex litigation. The maximum rates for associates and paralegals are $75.00 per hour and $40.00 per hour respectively. The

[5] The Court has considered defendants' argument regarding a reduction in the hourly rate for travel time between Toledo and Cleveland. The Court has also reviewed the authority cited by defendants. *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714, 717 (6th Cir. 1978) (Welck, J., concurring); *Anderson v. Redman*, 474 F. Supp. 511, 524 (D. Del. 1979). However, this Court finds defendants' argument unpersuasive.

Court is cognizant of the need to vary the hourly rate awarded depending upon the type of service being provided. *Northcross*, 611 F.2d at 638. However, plaintiffs have not specifically requested different rates for office and trial services. Therefore, the Court will not set different rates for these services. The Court will compensate plaintiffs differently for partners, associates and paralegals.

Plaintiffs also seek a 35% enhancement of the total amount of attorney's fees. Plaintiffs contend that this 35% enhancement is appropriate because of the delay in payment and the contingent nature of the fee arrangement. Since the Court has used current billing rates, the amount has aleady been adjusted for the delay in payment. Furthermore, this Court recognizes that the lodestar generally should not be enhanced except in unusual circumstances. *Blum v. Stenson*, 465 U.S. 886, 897 (1987). In *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 107 S. Ct. 3078 (1987), Justice White, writing a plurality opinion "conclude[d] that multipliers or other enhancement of a reasonable lodestar fee to compensate for assuring the risk of loss is impermissible under the usual fee-shift statutes." *Id.* at 3087. However, as plaintiffs correctly state, five justices concluded that enhancement above the lodestar for the risk of contingency may be appropriate in exceptional fee cases. *Id.* at 3102.

In the exercise of its discretion, this Court determines that an enhancement of the lodestar in this case is not appropriate. The Court has compensated plaintiffs' counsel for delay in payment by using current billing rates. Also, because the reasonable hourly rate was at the maximum rate for attorneys in the relevant market, the Court has compensated plaintiffs for the

complexity of the case and counsel's expertise. Furthermore, this Court does not equate this case to the category of exceptional cases discussed by the Supreme Court in *Delaware Valley*. Therefore, plaintiffs' request to enhance the total award of attorney's fees is not well taken.

Therefore, this Court determines that plaintiffs should be awarded attorney's fees of $765,922.75.

Partners	
Hours	4,415.75
10% reduction	- 441.58
Partners reasonable hours	3,974.17
Partners hourly rate	x 135.00
Partners attorney's fees	$536,512.95
Associates	
Hours	2,346.00
10% reduction	- 234.60
Associates reasonable hours	2,111.40
Associates hourly rate	x 75.00
Associates attorney's fees	$158,355.00
Paralegals/Summer Associates	
Hours	1,973.75
10% reduction	- 197.38
Paralegals/summer associates reasonable hours	1,776.37
Paralegals/summer associates hourly rate	x 40.00
Paralegals/summer associates fees	$71,054.80

Pursuant to 15 U.S.C. §15 and 28 U.S.C. §1920, plaintiffs have applied for their other costs and expenses of suit. Plaintiffs seek the amount of $18,559.90 for costs awarded in Langenderfer I. Plaintiffs also seek $376,312.39 for costs incurred between May 31, 1980 and

October 2, 1986. Further, plaintiffs' supplemental application for costs seek reimbursement from defendants in the amount of $10,729.75 for costs incurred between October 3, 1987 and April 30, 1987. The total amount of costs sought by plaintiffs is $405,602.04.

Chapter 28 U.S.C. §1920 provides:

> §1920. Taxation of costs
>
> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenograhic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. §1920 (1966 & Supp. 1987).

The costs recoverable under Section 4 of the Clayton Act are limited to those costs recoverable under Fed. R. Civ. P. 54(b) and 28 U.S.C. §1920. *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975); see also *Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 865-66 (7th Cir. 1981). Therefore, 28 U.S.C. §1920 enumerates the fees that may be taxed as costs, and Fed. R. Civ. P. 54(d) provides that costs shall be taxed against the losing party unless the court directs otherise. [sic]. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S. Ct.

2494, 2497 (1987). However, once the expense is deemed allowable, this Court must determine whether "the cost was reasonably necessary to the conduct of the litigation and that the amount of the cost is reasonable. . . ." *Sangamo Construction*, 657 F.2d at 864. Therefore, "[i]tems proposed by winning parties as costs should always be given careful scrutiny." *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964).

Plaintiffs request reinstatement of the amount of cost award in Langenderfer I. For the same reasons stated for denying plaintiffs' request to reinstate the award of attorney's fees for Langenderfer I, this Court will not reinstate the costs awarded in Langenderfer I in the amount of $18,599.90.

The first category of cost request by plaintiffs is telephone charges in the amount of $2,366.87.[6] The Court determines, and defendants do not object, that these costs are recoverable. *Northcross*, 611 F.2d at 639. Further, the Court determines, without objection from defendants, that plaintiffs are entitled to court costs in the amount of $1,092.80. Defendants also do not object to the award of $828.50 for trial transcripts. Therefore, pursuant to 28 U.S.C. §1920(2), the Court will award plaintiffs these costs.

Plaintiffs request the sum of $1,775.15 for postage and supplies. The court in Langenderfer I concluded that these costs were not recoverable. *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 224 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964). Although some courts have allowed costs for postage charges and supplies, this

[6] The telephone charges, as well as the remaining cost requested, will be the total amount of costs requested. Therefore, these figures will represent the combined total of plaintiffs' application and supplemental application.

Court will not allow such expenses, especially since plaintiffs have not specified that portion of the costs representing the cost of supplies or the nature of the supplies, some of which should be absorbed as part of the attorney's overhead. See *Daly v. Hill*, 790 F.2d 1071, 1083 (4th Cir. 1986). Therefore, this Court determines that these costs are not adequately documented and are not reasonable.

Plaintiffs also seek reimbursement for use of word processing, Lexis and Westlaw in the amount of $19,653.13. This Court is aware that some courts have reimbursed a prevailing party for computer assisted legal research. *Fressell v. AT&T Technologies, Inc.*, 103 F.R.D. 111, 114 (N.D. Ga. 1984); *Independent Tube Corp. v. Copperweld Corp.*, 543 F. Supp. 706, 723 (N.D. Ill. 1952); *Pitchford Scientific Instruments Corp. v. Pepi, Inc.*, 440 F. Supp. 1175, 1178 (W.D. Pa. 1977), *aff'd*, 582 F.2d 1275 (3rd Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). However, this Court is also aware of persuasive authority disallowing computer assisted legal research as a recoverable cost. *Berkey Photo v. Eastman Kodak Company*, 603 F.2d 263, 309 n.75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 613 F. Supp. 824, 836 (S.D.N.Y. 1985); *Wolfe v. Wolfe*, 570 F. Supp. 826, 828 (D.S.C. 1983); *Babb v. Sun Co., Inc.*, 562 F. Supp. 491, 495 (D. Minn. 1983); *Dick v. Watonwan County*, 562 F. Supp. 1083, 1110 (D. Minn. 1983) *rev'd on other grounds*, 738 F.2d 939 (8th Cir. 1984); *Guinasso v. Pacific First Federal Savings & Loan Ass'n*, 100 F.R.D. 264, 265 (D. Or. 1983). Furthermore, the Court is reluctant to award as costs, expenses incurred for the use of word processing. See *Litton*, 613 F. Supp. at 836. This type of expense should normally be absorbed as overhead and not charged to defendants under 28 U.S.C.

§1920. Also, plaintiffs have not adequately documented separately those expenses incurred for the word processing and computer legal assistance. *Northcross*, 611 F.2d at 637. Therefore, the Court does not deem these costs recoverable.

Plaintiffs seek compensation for photocopying in the amount of $60,772.14. Under *Northcross*, plaintiffs are entitled to recover for photocopying. *Northcross*, 611 F.2d at 639. However, the expense for photocopying must be reasonable. *Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 867 (7th Cir. 1981); *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 572 F. Supp. 92, 94 (E.D. Mo. 1983) *aff'd in part and rev'd in part on other grounds*, 736 F.2d 441 (8th Cir. 1984). Therefore, the costs of photocopying are recoverable to the extent such costs "were used as court exhibits or were furnished to the Court or the opposing counsel." *Beech Cinema, Inc. v. Twentieth Century Fox Film Corp.*, 480 F. Supp. 1195, 1198 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 1106 (2d Cir. 1980). Plaintiffs contend that 22,888 pages of documents were copied and produced to opposing counsel and an additional $11,010.60 in photocopying was incurred for court ordered exhibits. Therefore, the Court will allow $14,443.80 for photocopying.[7]

Plaintiffs request $8,267.80 for taking of depositions and for the purchase of deposition transcripts. As the Court determined in Langenderfer I, plaintiffs bear the burden of establishing that the depositions were "necessarily obtained for use in the case" under 28 U.S.C. §1920(2). Absent a showing that these depositions were reasonably necessary to the case even though the depositions were not used as evidence at trial, plaintiffs

[7] This figure allows the $11,010.60 for court ordered exhibits and the 22,888 pages of documents at $.15 a page.

are not entitled to these expenses. *Sangamo Construction*, 657 F.2d at 867. Also, part of the cost requested by plaintiffs represents copies of depositions. "Generally, the cost of obtaining copies of depositions is not taxable as a cost." *Rosebrough*, 572 F. Supp. at 94. Plaintiffs contend that since defendants spent 76 hours deposing plaintiffs' witnesses, plaintiffs should be entitled to their own depositions cost. While this argument does have some merit in regard to the necessity of these depositions, this argument misses the point. Plaintiffs are required to establish which depositions were reasonably necessary to this case. However, plaintiffs' conclusory statement that all the depositions were necessary does not establish that the depositions were necessary. Therefore, in the exercise of this Court's discretion the expense for depositions will not be awarded as a reasonable, necessary expense of this litigation.

Plaintiffs request an award of $239,829.94 for the services of expert witnesses. The Supreme Court has recently decided that, pursuant to 28 U.S.C. §1821, a prevailing party is entitled to expert witness fees of $30.00 per day. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 107 S. Ct. 2494, 2496 (1987). However, under 28 U.S.C. §1821, an expert witness is entitled to actual travel expenses if travel is by common carrier of the most economical rate reasonably available, 28 U.S.C. §1821(c)(1), or the mileage allowance proscribed for federal government employees if travel is by privately owned vehicle, 28 U.S.C. §1821(c)(2), charges for taxis and other miscellaneous expenses, 28 U.S.C. §1821(c)(3), and a subsistence allowance when overnight stay is required, not to exceed the maximum per diem for federal government employees, 28 U.S.C. §1821(d).

A review of the court's record reveals that plaintiffs' experts were present at trial and testified on the following days:

William G. Kelly	August 21 and 22, 1986
Thomas A. Good	September 4, 5 and 10, 1986
James A. Dalton Ph.D.	September 5, 1986
Werner Sichel Ph.D.	September 11, 1986

Therefore, plaintiffs are entitled to $210.00 for witness fees.

In addition, plaintiffs are entitled to expert witness' travel and subsistence allowance if properly documented. As in Langenderfer I, the Court is unable to determine from Exhibit 4C which expenses of Arthur Anderson & Co. were incurred specifically for travel and subsistance. Therefore, in the exercise of the Court's discretion, these expenses will not be recoverable with respect to Arthur Anderson & Co. However, plaintiffs' Exhibit 7 reveals that Thomas A. Good incurred hotel expenses on September 5, 1987 and September 10, 1987. Therefore, pursuant to 28 U.S.C. §1821(d)(1), plaintiffs will be awarded a $75.00 per day subsistence for a total of $150.00. After examining Exhibit 4A, this Court will award plaintiffs $168.00 for Werner Sichel's travel.[8] The Court will award plaintiffs $225.00 for Sichel's subsistence representing $75.00 per day for September 10, 1986 through September 12, 1986. James A. Dalton has claimed travel and subsistence of $1,933.42 for expenses incurred between July 1, 1986 through September 10, 1986. Because plaintiffs have failed to adequately document the expenses incurred for Dalton's

[8] Pursuant to 28 U.S.C. §1821(c)(1) & (c)(3) Sichel's air fare and taxi fare are recoverable expenses. However, pursuant to 28 U.S.C. §1821(c)(3), parking fees are only recoverable upon presentation of a valid parking receipt.

presence at trial, this Court is unable to determine the expenses incurred during September, 1986. However, plaintiffs' Exhibit 7 reveals that Dalton incurred hotel expenses on September 5, 1986 and September 10, 1986. Since the Court's record reveals that Dalton testified only on September 5, 1986, plaintiffs will be awarded $75.00 for subsistence, pursuant to 28 U.S.C. §1821(d)(1). Therefore, plaintiffs will be awarded a total of $828.00 for expert witness' travel, subsistance and fees.

Plaintiffs' last request is for their attorney's and supporting staffs' travel and subsistence in the amount of $52,455.81. Although plaintiffs attempt to justify this amount by contending that defendants' counsel used the same accommodations, this argument does not justify such an unreasonable amount. Furthermore, the fact that defendants may have been billed for its counsel's accommodations does not require this Court to award plaintiffs the total amount requested.

This Court is aware of the law in this circuit which permits an award for travel expenses. *Northcross*, 611 F 2d at 639. However, this Court is also aware of a number of decisions excluding the cost of travel and subsistence as a recoverable cost. See *Entertainment Concepts III, Inc. v. Maciejewski*, 514 F. Supp. 1378, 1352 (N.D. Ill. 1981) *United States v. Bedford Associates*, 548 F. Supp. 732, 753 (S.D.N.Y. 1982), *aff'd in part and modified in part*, 713 F.2d 895 (2d Cir. 1983). However, this Court is obligated to follow the law of the Sixth Circuit. Therefore, plaintiffs will be entitled to a reasonable amount for their travel and subsistence.

The Court has reviewed plaintiffs' exhibits and awards plaintiffs $3,285.53 for travel expenses. This amount does not include any travel expense incurred in

connection with the unsuccessful appeal and petition for certiorari of Langenderfer I.[9]

After reviewing the record, this Court determines that this Court was in session for this proceeding on the following dates:

Date	*Nature of Proceeding*
August 5, 1986	Hearings on Pre-trial Motions
August 6 and 7, 1986	Jury Impanelment
August 14 and 15, 1986	Trial
August 19 through 22, 1986	Trial
August 26 through 29, 1986	Trial
September 2 through 5, 1986	Trial
September 9 through 12, 1986	Trial
September 16 through 19, 1986	Trial
September 25 and 26, 1986	Trial
September 30, 1986	Trial
October 1, 1986	Jury Deliberation/Verdict

Although plaintiffs' subsistence fees are for accommodations at a downtown Toledo hotel, this Court determines that a reasonable amount of subsistence should reflect the per diem amount for governmental employees and expert witnesses during the relevant time period. See 28 U.S.C. §1821(d). Therefore, plaintiffs are entitled to a per diem allowance of $75.00 per day. In calculating this amount, the Court is cognizant that

[9] This Court has reviewed plaintiffs' Exhibits 3A, 3B, and 3C of the original application and plaintiffs' Exhibit 2 of the supplemental application. This Court has calculated the expense allowed and excluded some travel expenses as unreasonable in light of the incomplete and unexplained documentation of certain entries. *Northcross*, 611 F.2d at 637. Those travel expenses excluded from the computation are listed in Appendix A. Also excluded from these calculations are all references to attendance at trial or hotel accommodations.

plaintiffs routinely employed 3 attorneys and 1 paralegal during the trial. The Court determines that the use of these attorneys and a paralegal was reasonable. Therefore, the per diem allowance for subsistence will be calculated at $75.00 per day for each attorney and the paralegal.[10] In calculating the reasonable amount for subsistence, this Court determines that plaintiffs' counsel will be awarded $300.00 per day for 31 days. Therefore, this Court will award plaintiffs $9,300.00 for subsistence.

Therefore, the Court will award plaintiffs cost in the following amounts:

Telephone charges	$ 2,366.87
Court costs	1,092.80
Trial transcript	828.50
Photocopying	14,443.80
Expert witness fees	828.00
Travel and subsistence	12,585.53
TOTAL	$32,145.50

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that plaintiffs recover against defendants $765,922.75 for attorneys fees and $32,145.00 in costs.

JOHN W. POTTER
United States District Judge

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[10] The Court realizes that plaintiffs' counsel arrived in Toledo the day before trial began and left Toledo at the conclusion of each weekly session.

APPENDIX A

Plaintiffs Application for Attorneys Fees and Costs

(Exhibit 3C)

Date	*Amount*
11/28/83	$ 291.50
1/31/86	420.45
2/17/86	530.50
3/31/86	298.76
3/31/86	779.04
4/10/86	1,293.63
4/30/86	234.13
4/30/86	503.32
4/30/86	943.21
6/19/86	392.49
7/31/86	707.61
7/31/86	237.87

Plaintiffs Supplemental Application for Attorney's Fees and Costs

Exhibit 2

10/31/86	45.28

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT FOR REHEARING AND REHEARING *EN BANC*

(Filed January 23, 1991)

No. 87-3543/3577/3881/3882
88-3126/3127/3574/3651/3435

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

G.M. SADER EXCAVATING & PAVING, INC.,
Plaintiff-Appellee/Cross-Appellant,

v.

S.E. JOHNSON COMPANY, *et al.*,
Defendants-Appellants/Cross-Appelles.

ORDER

BEFORE: MARTIN, *Circuit Judge*; LIVELY and WELLFORD*, *Senior Circuit Judges.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

* Hon. Harry W. Wellford assumed senior status on January 21, 1991.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

CONSTITUTION AND STATUTES

Constitution of the United States, Amendment VII—Civil Trials:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Section 2 of the Sherman Act, 15 U.S.C. §2 (1974):

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act,
15 U.S.C. §15(a) (1982):

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

28 U.S.C. §1961 (as amended) APR. 2, 1982, P.L. 97-164):

Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually. . . .

DEFENDANTS-APPELLANTS' BRIEF ON THE MERITS, EXCERPT: "ISSUES PRESENTED"

ISSUES PRESENTED

I. MONOPOLY POWER

Whether as a matter of law monopoly power may be found:

a. In the supply of sand for State and Turnpike jobs, where plaintiffs offered no market share evidence, Johnson operates one sand pit, there are numerous sources of sand, and none of Johnson's competitors depends on Johnson for sand.

b. In the supply of limestone for State and Turnpike jobs, where Johnson is only the second largest limestone producer, there are numerous sources of limestone, and none of Johnson's competitors depends on Johnson for limestone.

c. In the supply of asphalt for State and Turnpike jobs, where there are many asphalt producers, entry has occurred, there is excess production capacity and none of Johnson's competitors depends on Johnson for asphalt.

d. In the bidding and performance of State and Turnpike jobs, where only the low bid wins, there are many bidders, prices have been low since 1970, entry has occurred, and Johnson's market share fluctuates widely from year to year.

e. Where purchases that enabled Johnson to diversify, compete in a wider geographic area and become more efficient resulted in lower costs for Johnson and lower prices for the State and Turnpike.

II. ANTICOMPETITIVE CONDUCT

Whether the court erred in denying Johnson's motions for a directed verdict when plaintiffs failed to support their allegations of anticompetitive conduct, relying instead on evidence of Johnson's "low," above-cost bids.

III. ANTITRUST INJURY

Whether antitrust injury may be based on plaintiffs' inability to bid as low as Johnson and still make a profit.

IV. RELEVANT GEOGRAPHIC MARKET

Whether 13 counties can constitute a relevant geographic market for M&B, which performs 90 percent of its work in two counties and has never worked in 10 of the 13 counties.

V. STANDING

Whether MacRitchie Materials has standing to sue where its customers allegedly were harmed by Johnson's lawful bidding.

VI. REVOCATION OF CREDIT PRIVILEGES

Whether Sader, which is neither a consumer nor a competitor in any relevant market, may recover under Section 2 of the Sherman Act when Johnson revoked Sader's credit privileges after repeated violations of Johnson's established credit policy.

(2)

No. 90-1581

Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ARTHUR S. LANGENDERFER, INC., *et al.*,
Petitioners,

v.

S.E. JOHNSON COMPANY, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1581

ARTHUR S. LANGENDERFER, INC., *et al.*,
Petitioners,

v.

S.E. JOHNSON COMPANY, *et al.*,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

S.E. Johnson Company and the other respondents (collectively "Johnson")[1] submit this Brief in Opposition to the Petition for a Writ of Certiorari filed by petitioners Arthur S. Langenderfer, Inc. ("Langenderfer"), Northern Ohio Asphalt Paving Co. ("NOAP"), MacRitchie Materials, Inc. ("MacRitchie Materials"), M&B Asphalt Co. ("M&B") and G.M. Sader Excavating & Paving Co. ("Sader").

STATEMENT OF THE CASE

Johnson and Langenderfer competed for state highway paving projects. Contracts were awarded by the state to the lowest qualified bidder. The volume of

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[1] Respondents have no parent corporations, subsidiaries, or affiliates to list pursuant to Rule 29.1.

paving work fell in the early 1970s and, as a consequence, prices and profit margins shrank (JA at 932-33, 4524-26).[2] Johnson operated at a profit; Langenderfer, which bid below its costs, did not (JA at 937-39). Langenderfer went out of business in 1978 and blamed Johnson for its demise.

This litigation began only after Johnson rejected Langenderfer's invitation to "raise bid prices" and to "stabilize the market" (JA at 1006-08).

Langenderfer and NOAP[3] sued in 1976. Following the first trial, the Sixth Circuit rejected plaintiffs' complaints about Johnson's above-cost bids as a matter of law, stating: "It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1057 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984)("*Langenderfer I*"), *cited with approval in Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986).

M&B, Sader and Langenderfer's affiliate MacRitchie Materials joined the original plaintiffs in a second lawsuit. The two cases, which contained essentially the same allegations, were consolidated for trial.

At the second trial, plaintiffs renewed their complaints about Johnson's low bids. Plaintiffs also al-

---

[2] Citations to "JA" are to the Joint Appendix in the Court of Appeals. Citations to "App." are to the Appendix filed with the Petition in Case No. 90-1581.

[3] NOAP is a sister company of Langenderfer. It purchased stone and sand and used it to mix asphaltic concrete.

leged that Johnson monopolized the production and supply of limestone approved for state paving contracts. Proof of these allegations was essential because, without proof of monopoly in limestone, claims of monopolistic stone pricing, price squeezing and tying could not stand. In short, without proof of a limestone monopoly, plaintiffs' case was nothing more than legally insufficient competitor complaints about low bids.

Prior to trial, Johnson moved *in limine* to exclude evidence, *inter alia*, of losses on jobs Langenderfer won and on jobs outside the relevant market (JA at 152-53, 162-63, 167). At the close of the evidence, Johnson renewed motions for directed verdict that it had made at the close of plaintiffs' case (*id.* at 2901, 3721). The jury returned a verdict for each plaintiff. Johnson timely moved for judgments notwithstanding the verdicts and for a new trial (*id.* at 283, 285-86). In these motions, and in its directed verdict motions, Johnson challenged, *inter alia*, (1) each party's right to recover absent monopoly power in raw material markets; (2) Langenderfer's reliance for proof of damages on profits from jobs outside the relevant market and on losses from jobs Langenderfer won; and (3) Sader's right to recover since it was not a participant in any relevant market (*id.* at 283, 285-86, 2902, 2904, 2908, 2911, 2926, 2927, 2930, 3721, 3836-37, 3851, 3853, 3886). The District Court denied these motions. The Sixth Circuit held, however, that the evidence could not support the jury finding of monopoly in limestone, or in any other raw material market. The Sixth Circuit upheld the judgment for Langenderfer, although for a reduced amount, and reversed the judgments for the other plaintiffs. In its

71-page opinion, the Sixth Circuit gave the plaintiffs the benefit of every reasonable inference that could be drawn from the evidence and scrupulously followed the appropriate standards of appellate review.

Johnson petitioned this Court for a writ of certiorari on April 22, 1991. That petition (Case No. 90-1623) seeks review of two significant questions under the antitrust laws:

1. Whether monopoly power may be found in a government contract bid market absent collusion where there are many competitors and entry has occurred;

2. Whether a monopolist's lawful, above-cost pricing gives rise to antitrust injury.

Langenderfer and the other plaintiffs filed the instant petition on April 12, 1991. Plaintiffs' petition is without merit. Plaintiffs point to no conflict among the circuits or with a decision of this Court, and they have not raised any true constitutional issue. The petition has six sections. This brief responds to each section.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT APPLIED THE APPROPRIATE STANDARD OF REVIEW

Plaintiffs assert that the Court of Appeals usurped the jury's function by weighing the evidence and substituting its own "vision of 'economic reality.' " They state also that the opinion below is "precedent, which if allowed to stand, will hereafter plague the course of innumerable appeals and judicial supervision of jury verdicts."

These assertions are wholly without merit. Nothing in the text of the appellate court's 71-page opinion departs from established principles of appellate review. Contrary to plaintiffs' assertions, the court was careful to apply the appropriate standard of review:

> Once the jury has acted, we set aside its verdict and the district court's refusal to grant a j.n.o.v. motion only if we are satisfied, upon a thorough review of the record, that error has been committed. We also give plaintiffs the benefit of reasonable and favorable inferences that may be drawn from the evidence. We may not pass upon credibility of witnesses in making this review. To the extent, of course, that the district court drew or made legal conclusions based on the jury's responses to interrogatories, we may review decisions of law *de novo*.

(App. A10). The court gave particular deference to the judgments for Langenderfer and NOAP because two juries had found in their favor. (*Id.*)

Even under such stringent standards, the Sixth Circuit held that plaintiffs failed to prove that Johnson either possessed or posed a dangerous probability of achieving monopoly power in the production or supply of the relevant raw materials (sand and limestone) in any geographic market. This holding rested on *plaintiffs'* market share evidence, *plaintiffs'* alleged relevant markets and submarkets, and *plaintiffs'* exhibits and testimony. That evidence established that none of the plaintiffs depended on Johnson for raw materials, all of the plaintiffs had their own or independent raw material sources, and Johnson's high-

est share of the market was 30% (App. A17, A21, A26, A30, A31-33, A42-44, A53). Plaintiffs do not point to any error in these conclusions.[4]

While plaintiffs say the court usurped the jury's fact-finding function, they point to no evidence that conflicts with the basis of the court's decision. In short, section I of the petition has nothing to do with the applicability of the summary judgment standards articulated in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); rather, it is a direct challenge to the authority of courts of appeals to reverse jury verdicts due to insufficient evidence. It is well-settled, however, that the Seventh Amendment does not bar appellate review to determine whether the evidence is sufficient to submit to a jury. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321-22 (1967); *Galloway v. United States*, 319 U.S. 372, 389 (1943); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 661 (1935).

II. THE COURT PROPERLY CONSIDERED LANGENDERFER'S DAMAGES AND NOAP'S STANDING

A. Plaintiffs Have Shown No Infringement Of The Seventh Amendment In The Reversal Of NOAP's Judgment Or In The Modification Of Langenderfer's Damages

Plaintiffs' Seventh Amendment challenge is directed at two distinct holdings of the Court of Appeals. First, the Sixth Circuit held that NOAP's claim was invalid as a matter of law. Second, the

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[4] The court specifically rejected four alleged anticompetitive acts: monopolistic stone pricing, price squeeze, tying, and refusal to sell stone (App. A29, A37-38, A41, A53-54, A54 n.26). Again, petitioners point to no error in these conclusions, which rest, in part, on the failure of proof of monopoly power in stone.

court held that the damage award to Langenderfer was infected by reliance on improper evidence.

1. The Court Correctly Reversed The Judgment For NOAP

NOAP ignores the substance of the Court of Appeals' holding, and addresses the standing discussion out of context.

NOAP alleged it was in the business of purchasing sand and stone and selling asphaltic concrete to Langenderfer and others. As an asphalt producer, the only claims asserted by NOAP that could have given rise to direct, antitrust injury—monopolistic stone pricing and tying—were specifically rejected by the court because there was no evidence of monopoly power in raw material markets. The court concluded that NOAP "has established no antitrust injury by reason of defendants' stone and sand activities and mergers during any relevant period" (App. A46). That ought to have brought NOAP's claim to an end.

The court went further, however, out of deference to the jury, to consider whether it might sustain the verdict for NOAP on some other ground. The court thus considered whether NOAP was entitled to damages because its principal customer, Langenderfer, was allegedly driven from the market by Johnson: "May NOAP nevertheless recover for indirect damages, apart from the sand and stone aspects of this controversy, by reason of the anticompetitive conduct of defendants, as paving contractors, directed toward and harming Langenderfer?" (App. A47) After full consideration of this possible claim, the court rejected it, holding that NOAP would lack antitrust standing to assert it.

2. Langenderfer Has Shown No Error In The Modification Of The Damage Award

Langenderfer does not dispute the accuracy of the court's modification of damages.[5] The court modified the damages for two reasons. First, the "calculation includes damages for *both* Langenderfer and NOAP" (App. A61). Once the court concluded that the award for NOAP could not stand, it was duty-bound to adjust the award. Even Langenderfer does not contend that it is entitled to damages attributable to NOAP if the decision to reverse NOAP's judgment is correct.

Second, the court determined that the damages awarded Langenderfer alone were not supportable on the record. The court found the award legally infirm because, *inter alia*, the base period measure of damages included profits from work unrelated to state paving contracts (and therefore outside the relevant market), and the damage claim included job losses where Langenderfer had bid below its own costs (App. A64, A65).

3. Plaintiffs' Seventh Amendment Rights Were Not Affected

It is in the foregoing context that plaintiffs contend that the court's modification of Langenderfer's dam-

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[5] If anything, the panel was overly generous in its award. Langenderfer's own evidence established a 1.32% profit margin on state work between 1968-70. Between 1973 and 1977 Langenderfer won state contracts worth $4.7 million (JA at 4278 (Px. 71)). Thus, even assuming Langenderfer's profit margin on its state work remained constant after 1970 and through 1973-77 (an assumption the panel rejects as unfounded), Langenderfer's "damages" would have been $62,040 (1.32% of $4.7 million), not the $191,454 awarded by the panel.

age award and consideration of NOAP's standing infringed their rights under the Seventh Amendment.

NOAP complains that the lack of antitrust standing should not be a bar because NOAP's standing was not raised below. NOAP points to no error in the determination that it lacked standing to recover for injury occasioned by its status as supplier to Langenderfer or to any fact on which the evidence was in conflict. NOAP complains that "[t]he common law proscription referred to in the Seventh Amendment limits appellate review to issues properly raised below or on appeal." Petition at 19. NOAP cites no authority for this interpretation of the Seventh Amendment.

Antitrust standing is a question of law, and is not a question for the jury. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 545 (1983). Accordingly, no Seventh Amendment issue is presented even if, as NOAP contends, the appellate court, *sua sponte* noticed the error.

NOAP argues that an appellate court errs if it ever considers issues not raised below. This argument is contrary to settled law:

> The matter of what questions may be taken up and resolved for the first time on appeal is left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any

> doubt, see *Turner v. City of Memphis*, 369 U.S. 350, 82 S. Ct. 805, 7 L.Ed.2d 762 (1962), or where "injustice might otherwise result." *Hormel v. Helvering*, 312 U.S., at 557, 61 S. Ct. at 721.

Singleton v. Wulff, 428 U.S. 106, 121 (1976). "These examples are not intended to be exclusive." *Id.* at 121 n.8.

NOAP also says that the Sixth Circuit violated its Seventh Amendment rights because NOAP's standing to claim indirect injury was not briefed to the appellate court. This issue, too, is long-settled by Supreme Court precedent:

> If the refusal to grant the motion for a new trial was deemed by the Circuit Court of Appeals plain reversible error, it was at liberty under its rules to notice the error although not assigned and the omission from the record of the grounds of the motion would be no obstacle to a review, since the motion was obviously directed to the failure to award substantial damages.

Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 480-81 (1933). Here, Johnson appealed the denials of its motions for a directed verdict, judgment notwithstanding the verdict, and a new trial. Those motions and the appeal challenged NOAP's right to recover absent monopoly power in raw material markets.

Moreover, the standing issue was fully briefed and argued with respect to NOAP's sister company, MacRitchie Materials. The Sixth Circuit's recent decision in *Pinney Dock and Transport Co. v. Penn*

Central Corp., 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988), is on point. There, antitrust standing had not been raised below as to one plaintiff, but had been as to another. 838 F.2d at 1461. The two plaintiffs occupied the same position in relation to the relevant market as do MacRitchie Materials and NOAP here. *Id.* at 1449. The court in *Pinney Dock* found the antitrust standing arguments presented "with sufficient clarity and completeness" to allow resolution as to the plaintiff against whom the issue had not been raised. *Id.* at 1461.

The reduction in Langenderfer's damages does not present a Seventh Amendment issue. In its motion for a new trial to the District Court, Johnson specifically challenged the propriety of including base period profits outside the relevant market as a measure of damages, and of awarding damages for losses on jobs Langenderfer won (JA at 285-86). The Court of Appeals relied on these grounds in modifying the damage award (App. A64-65).

Langenderfer characterizes the Court of Appeals' decision as a directed verdict. The verdict for Langenderfer, however, was affirmed. The modification of the verdict, therefore, could only have been based on a review of the order denying the new trial. Since Johnson's new trial motion in the District Court raised the issues addressed by the Court of Appeals, one procedural predicate (issues not raised below) of Langenderfer's petition is infirm.

This Court has three times considered, but not reached, the question whether a court of appeals may review a district court denial of a new trial motion based on an argument that the verdict is excessive. *Browning-Ferris Industries of Vermont, Inc. v. Kelco*

Disposal, Inc., 492 U.S. 257, 109 S. Ct. 2909, 2922 n.24 (1989); *Grunenthal v. Long Island R. Co.*, 393 U.S. 156, 158 (1968); *Neese v. Southern R. Co.*, 350 U.S. 77 (1955). Neither the opinion below nor Langenderfer's petition presents that question here.

Unlike the cases previously before the Supreme Court, which dealt with lower court discretion to determine the "excessiveness" of damage awards, the Sixth Circuit here was concerned with damages based on erroneous damage evidence. Here the jury was allowed to consider evidence of damages outside the relevant market and evidence of damages based on jobs Langenderfer bid below its own costs.

In its petition, Langenderfer cites two cases, *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 (1937), and *Young v. Central Railroad Co.*, 232 U.S. 602 (1914), for the broad proposition that a "Court of Appeals cannot direct a verdict in a jury case in view of the Seventh Amendment prohibitions." Those cases addressed the interplay between motions for directed verdict and for judgment notwithstanding the verdict.[6] For example, *Kennedy* addressed the effect of a plaintiff's

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[6] *Kennedy* and *Young* were decided before the addition of Rule 50(b) to the Federal Rules of Civil Procedure. Rule 50(b) limits, if it does not undermine, the continued viability of these cases. These cases arose under the Conformity Act and concerned the procedural pitfalls from a trial court's not reserving the issues raised in a motion for a directed verdict. The cases do not apply to the modification of Langenderfer's damages since that involved the court's power to order a new trial. As to the reversal of NOAP's judgment, to the extent these decisions have any continued viability as Seventh Amendment precedents, they would not apply here since Johnson moved for both a directed verdict and judgment notwithstanding the verdict.

failure to file a motion for judgment notwithstanding the verdict following a motion for a directed verdict. 301 U.S. at 394. *See Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 52 (1952). In short, these cases are inapposite to the modification of Langenderfer's damages.

Langenderfer has not asked this Court whether a court of appeals must order a new trial on damages once it finds that an award of damages is infirm. Courts often have ordered a new trial or permitted the plaintiff to elect a remittitur. *Phillips & Colby Constr. Co. v. Seymour*, 91 U.S. 646, 656 (1876); *Hansen v. Boyd*, 161 U.S. 397, 411-12 (1896); *Osborn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 919 (5th Cir. 1987). Where, however, the amount of damages is readily ascertainable, a court may determine damages under its power to grant summary judgment on that single remaining issue. *Taylor v. United States*, 821 F.2d 1428 (9th Cir. 1987), *cert. denied*, 485 U.S. 992 (1988); *Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352, 367 (6th Cir. 1978); *Feinsinger v. Bard*, 195 F.2d 45, 55 (7th Cir. 1952); 6A J. Moore, J. Lucas, G. Grotheer, *Moore's Federal Practice & Procedure* ¶¶ 59.06, 59.08[6], 59.08[7] (2d ed. 1985). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)(summary judgment is addressed to "whether there is a need for a trial. . . .")[7]

A remand of Langenderfer's case for a new trial on damages could only have resulted in delay and a

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[7] Where the amount of damages cannot objectively be determined—for example, in tort cases involving pain and suffering—a Seventh Amendment question may arise. *Kennon v. Gilmer*, 131 U.S. 22, 26-31 (1889); *Carter v. District of Columbia*, 254 App. D.C. 71, 795 F.2d 116 (1986).

lower damage award because the court gave Langenderfer the benefit of every inference and presumption consistent with the law. The court specifically recognized this, stating it was modifying the damage award "to avoid delay in further remand and hearings . . ." (App. A68).

The only potential dispute here is whether this Court might reach a different conclusion regarding the maximum amount of damages. That issue is not a constitutional one and does not warrant review by this Court.

B. Plaintiffs' Due Process Contention Has No Merit.

Plaintiffs' due process claim is fundamentally flawed. The Federal Rules of Appellate Procedure authorized plaintiffs to petition for rehearing by stating "with particularity the points of law or fact which in the opinion of petitioner the court has overlooked or misapprehended. . . ." Fed. R. App. P. 40(a). Similarly, the Sixth Circuit's Internal Operating Procedures specifically authorized plaintiffs to file a petition for rehearing to, *inter alia*, "bring to the attention of the panel claimed error of fact or law in the opinion." Sixth Circuit Internal Operating Procedure 20.2. Plaintiffs filed a petition for rehearing, but chose not to address the underlying merits of the Sixth Circuit's standing analysis or modification of damages. They were not deprived of due process since they were afforded an opportunity to be heard.

III. THE COURT OF APPEALS PROPERLY FOUND THE EVIDENCE INSUFFICIENT TO SUPPORT THE OTHER PLAINTIFFS' CLAIMS

The other plaintiffs contend that, since the *jury* found in their favor, the Seventh Amendment pre-

cludes the court from considering the sufficiency of the evidence. Plaintiffs' complaint is simply that, by testing the evidence rather than accepting the jury's findings at face value, the court violated the Seventh Amendment. As discussed in Section I, *supra*, the Seventh Amendment does not bar appellate review of the sufficency of the evidence to support the verdict. *Neely*, 386 U.S. at 321-22; *Galloway*, 319 U.S. at 389; *Baltimore & Carolina Line*, 295 U.S. at 658-61.[8] Each of the grounds on which the Court of Appeals relied was raised in the motions to the District Court and in briefs to the Court of Appeals.

In any event, plaintiffs have not identified any evidence that contradicts the Sixth Circuit's holdings regarding the geographic and product markets in which the plaintiffs compete. With regard to geographic markets, the court held that M&B was not an actual or potential competitor throughout the thirteen counties. The court also considered M&B's submarket claims, and held the evidence insufficient to support them (App. A12). M&B does not point to any factual error in these holdings.

The court considered Sader's claims, and found no evidence that Sader was ever a potential competitor for state paving contracts, or that it ever intended to compete beyond two specific counties (App. A19). The court considered Sader's submarket claim, and found a failure of proof (*id.* at A26). Sader's petition points to no errors of fact or law in these findings.

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[8] Plaintiffs' reliance on *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962), is misplaced. That case deals solely with a court's duty to construe ambiguities in special interrogatories so as to sustain, if possible, the jury's verdict. *Id.*

With regard to product markets, plaintiffs claimed at trial that Johnson abused monopoly power in the market for limestone or sand approved for use on state paving projects. The evidence showed that Johnson was not the largest producer of state-approved limestone and there were numerous sources of this material in northwestern Ohio.[9] Plaintiffs offered no market share evidence regarding sand, but identified numerous sources of natural and manufactured sand and admitted that none of the parties depended on Johnson for sand.

The Court of Appeals held that this evidence was clearly insufficient to support a finding of monopoly power in these markets. Plaintiffs do not challenge the accuracy of the facts underlying these holdings.

Plaintiffs now contend that the product markets consist of the stone and sand actually used on particular state jobs. This contention makes no sense. If there is a raw material market, it must include "those products that have reasonable interchangeability for the purposes for which they are produced. . . ." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 404 (1956). In this case, that would include production of state-approved limestone, sand or asphalt that was available, whether or not used for state jobs. This is in fact the market definition presented by plaintiffs at trial, both in testimony and exhibits (JA 4128-38, 4162). It is also the market definition given to the jury.

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[9] Plaintiffs' own experts testified that they found monopoly power in the ODOT-approved limestone market only by combining Johnson's share of production with that of France Stone, the largest producer in the market. The court properly rejected that theory.

IV. THE COURT DID NOT USURP THE JURY'S FUNCTION REGARDING SADER'S CLAIM

The Court of Appeals held that Sader's claim was infirm for four reasons (App. A29). Principal among these was a failure to prove that Johnson monopolized any market in which Sader participated (*id.* at A27). Absent monopoly power or a purpose to obtain a monopoly, no jury issue regarding Johnson's alleged refusal to deal ever arose.

V. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DECISION NOT TO AWARD ATTORNEYS FEES FOR THE UNSUCCESSFUL PROSECUTION OF LANGENDERFER I

Langenderfer seeks review of the affirmance of the District Court's denial of fees for the unsuccessful prosecution of *Langenderfer I*. The Court of Appeals properly reviewed the District Court's fee award for abuse of discretion and found none. *Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541, 2553 (1988). The District Court properly determined that Langenderfer could not recover attorneys' fees for work done on unsuccessful claims. *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). Langenderfer points to no error of law or fact and identifies no conflict with any other court.

VI. THE DENIAL OF PREJUDGMENT INTEREST WAS PROPERLY AFFIRMED

Langenderfer also seeks review of the affirmance of the District Court's decision to deny interest on the vacated *Langenderfer I* judgment. In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S. Ct. 1570 (1990), however, this Court held that post-judgment interest may not be calculated until the amount of damages is ascertained. 110 S. Ct. at 1576. Here, the

amount of damages was not ascertained at the time of the first judgment because it was vacated. *Id.*, *citing with approval, Federal Deposit Ins. Corp. v. Rocket Oil Co.*, 865 F.2d 1158 (10th Cir. 1989). The Sixth Circuit's decision is consistent with, and compelled by, this Court's decision in *Bonjorno.*[10]

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[10] Langenderfer's claimed circuit conflict is illusory. *Bailey v. Chattem*, 838 F.2d 149 (6th Cir.), *cert. denied*, 486 U.S. 1059 (1988), and *Handguards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985), were decided before *Bonjorno. H&J, Inc. v. Flygt Corp.*, 925 F.2d 257, 261-62 (8th Cir. 1991), awarded post-judgment interest from the date of a judgment that the court had *affirmed.*

CONCLUSION

For the reasons stated, Respondents request that this Court deny the Petition in Case No. 90-1581.

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No. 90-1581

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IN THE

Supreme Court of the United States

October Term, 1990

ARTHUR S. LANGENDERFER, INC., *et al.*,
Petitioners,

vs.

S. E. JOHNSON COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENTS' MISSTATEMENT OF THE CASE

Respondents ("defendants" or "Johnson") misstate the case. They persist in rearguing that Petitioners' ("plaintiffs") case is nothing more than a complaint about defendants' "low bidding." Defendants refuse to recognize that the trial court (affirmed by the Sixth Circuit) cured any risk of that.[1] The jury verdicts were expressly based on the finding that defendants' anticompetitive conduct arose, *not from low bidding,* but from "The [thirteen] acquisitions [which] were all made to exclude &/or injure competition, and increase Johnson's power which he succeeded in doing." (Jury Ans. to Itg. No. 10; A81),[2] The Sixth Circuit properly held this was a jury question on the first *Langenderfer I* appeal. 729 F.2d at 1058-59. Defendants omit to mention that as a result of those acquisitions, defendants controlled 75% to 85% of the Ohio Turnpike paving market and between 40% and 80% of the OTC/ODOT paving market over thirteen years in Northwestern Ohio (1972-85). They also controlled the "inputs" (stone, sand and asphalt) that went into those paving jobs. They also neglect to mention that the Sixth Circuit found on both appeals:

> Substantial evidence indicated that Kirkby, both individually and as chief officer of Johnson, intended to eliminate competition and dominate the market *** [and that] *Johnson's acquisitions significantly*

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[1] The trial court expressly charged the jury: "I instruct you that defendants' profitable bidding does not constitute anticompetitive conduct as a matter of law, and you may not base a verdict on the fact that defendants were able to bid lower than competitors and still make a profit." (Court's Chg. at JA 218, 3815). The Sixth Circuit in *Langenderfer II* held that this instruction cured improper inferences that might otherwise have been drawn by the jurors *as to all plaintiffs* about low bidding (917 F.2d at 1440; A53). The jury is presumed to have followed the court's instructions. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985).

[2] References to "A" are to the Appendix to the Petition. References to "JA" are to the Joint Appendix in the Court of Appeals. Respondents' Opposition is cited as "Opp." Emphasis is that of undersigned counsel.

> *reduced competition and increased market concentration thereby creating a monopolistic market structure.*

729 F.2d at 1054; 917 F.2d at 1417-18; A68. *See* Petition (pp. 2-12) for a full Statement of the Case.

REASONS FOR GRANTING THE WRIT

I. Neither The Seventh Amendment Nor *Matsushita* Permits A Court Of Appeals To Substitute Its View Of Economic Reality For The Jury's Findings.

The very arguments advanced in Respondents' Opposition establish with compelling force why it is necessary for the Court to scrutinize closely the appellate conduct at issue here. Plaintiffs are not complaining about appellate review of sufficiency of the evidence, but about the improper reexamination of the jury's findings contrary to the Seventh Amendment.

The same Court of Appeals (the same two judges sitting) has now twice reversed unanimous jury verdicts in this 15-year old monopoly case and overruled two different, experienced trial judges who permitted the verdicts to stand. It has purported to do so on the grounds of insufficient evidence. It has disregarded the major findings of a carefully instructed jury on answers to special interrogatories. It has paid lip service to traditional standards of review and then ignored them in making its own findings.[3] It has reversed on issues not even raised below and on findings *the jury did not make.* It has taken the place of the jury in redetermining damages which were never challenged below and never

[3] We agree (Opp. 5) that the appellate court invoked all the talismanic standards of review, but it then proceeded to ignore them in disregarding the jury's explicit findings and making its own *de novo* findings. The Sixth Circuit's 71-page opinion is replete on its face with the weighing and sifting of evidence, credibility judgments, disparagement of plaintiffs' evidence, an argumentative tone, blunderbuss conclusions drawn as to each of the unsuccessful plaintiffs and finally, the grudging affirmance after evisceration of Langenderfer's damage award because the jury did not understand "economic reality."

appealed. In reducing Langenderfer's damages by two-thirds, it has gratuitously stated that "some of the dollar figures offered by plaintiffs and their experts simply *fail to reflect economic reality* and we shall make adjustment accordingly. . . ." (A62). This is not simply "recalculation" or "correcting arithmetical errors"—this is *sua sponte* determination of damages *de novo*. This is taking the "economic plausibility" of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) far beyond its intended application. If the Sixth Circuit approach is correct, every court of appeals now has license to disagree with juries and experts on economic theories of damages and apply its own;[4] the Seventh Amendment, and the right to a fair hearing in the appellate courts, will be swiftly replaced by judicial theorizing as to what is "plausible" or "economic reality" without regard to the constitutional right to trial by jury or the integrity of the appellate process.

II. The Seventh Amendment Precluded *Sua Sponte* Review Of Langenderfer Damages Or NOAP's Standing. The Issues Were Never Raised Or Preserved At Trial Or On Appeal.

A. Defendants concede they waived the issue of NOAP's standing; judgment for NOAP must be reinstated.

Defendants waived any issue as to NOAP's standing. In contrast, they raised MacRitchie Materials' standing every step of the way (*See* Issues Presented V,

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[4] For example, the Sixth Circuit arbitrarily excluded (without citation) Langenderfer's first method of proving damages for losses on jobs it won. This was contrary to every scrap of economic and accounting testimony on the subject (JA 2588-96; 2676-78; 2867-69). Even defendants' experts agreed (JA 2283-93; 3672-74). Net operating losses have always been recoverable. "[P]laintiffs may recover the net losses that were actually incurred in addition to the profits they would have made." *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 559 F. Supp. 922, 930 (E.D. Pa.), *aff'd* 752 F.2d 802, 814 (3d Cir. 1984).

A128). Whether standing is a legal or factual issue makes no difference here. It was waived as long ago as 1980 in *Langenderfer I. Defendants silently concede they never preserved it below or raised it on appeal.* They cite to *nothing* in the record (*See* Opp. at 11). Instead, defendants argue by reference to *dictum* in *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). But appellate courts simply do not create issues that have been knowingly waived. *E.g., Brown v. Marshall*, 704 F.2d 333, 334 (6th Cir. 1983) (*per curiam*). Even defendants do not have the nerve to argue that "injustice" might result from the court not taking up an issue they did not think important enough to raise. The Sixth Circuit admitted that "the [standing] issues are extremely close as to NOAP's antitrust claims of indirect injury" (A50). NOAP's standing and its right to recover damages were subsumed in the jury verdicts. Under the Seventh Amendment, that result must be respected. There is no justification, legal or otherwise, for the Sixth Circuit's gratuitous reach to strike down NOAP's standing. NOAP's judgment should be reinstated along with Langenderfer's.

B. Defendants concede they never raised the excessiveness of Langenderfer's damage verdict as grounds for a new trial.

The excessiveness of a verdict must be raised on a motion for a new trial with specificity. If not raised, it is gone. The Sixth Circuit, out of deference to the Seventh Amendment, has held that "failure to include an excessive damages issue in a motion for a new trial or otherwise present it to the trial court precludes our review." *Young v. Langley*, 793 F.2d 792, 794-95 (6th Cir.), *cert. denied*, 479 U.S. 950 (1986). Specific grounds not set forth in a motion for new trial cannot be considered by the Court of Appeals. *Turner v. Ohman House Corp.*, 376 F.2d 347, 349-50 (6th Cir. 1967); *Haley v. Wyrick*, 740 F.2d 12, 13-14 (8th Cir. 1984). The Sixth Circuit failed to follow its own rules.

Defendants, in effect, concede that they never challenged the excessiveness or amount of the Langenderfer *and NOAP* verdict. Their new trial papers and briefs contain no reference to the size of the verdict (*See* JA 285-86 attached). Defendants specified thirteen separate grounds for a new trial, but excessive damages was not one of them. Instead, defendants now argue that objections to the admission of certain damage evidence is the same as specifying excessiveness as grounds for a new trial (Opp. 11-13).[5] This is not the law. An asserted error in the admission of evidence is not the same as a claim that a verdict is excessive. Excessiveness was waived; the Sixth Circuit was without power to create grounds where they did not exist.

In order to avoid the consequences of their waiver, defendants now say that the Sixth Circuit reduced the damages by two-thirds, not because they were excessive, but because "the damages [were] based on erroneous damage evidence." (Opp. 12). If reviewing courts (trial and appellate) can *sua sponte* decide *ex post facto* that the damage evidence was "erroneous," there will be a lot of damage awards "adjusted accordingly." The Seventh Amendment will have become a futile protection against tampering with jury damage verdicts. Neither an appellate court nor a trial court can fix or redetermine damages in a jury case; their sole powers are to order a new trial or order a remittitur on condition that otherwise a new trial will be granted. *McKinnon v. City of Berwyn*, 750 F.2d at 1383, 1392 (7th Cir. 1984). Defendants' argument citing remittitur cases (Opp. 13) is inapposite. Remittitur procedure was not raised or followed here. The Court of Appeals action is solely limited to reviewing the trial court's action for abuse of discretion, not the jury verdict itself. *Young v. Langley*, 793 F.2d at 794-95.

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[5] Defendants argue (Opp. at 8) that "once the court concluded that the award for NOAP could not stand [on issues that were never raised or argued], it was duty bound to adjust the award" even though it was defendants' forms that lumped Langenderfer and NOAP together for damage purposes. Having invited the "error" now defendants use it as a bootstrap to uphold the appellate court's action.

III. The Court Of Appeals Did Not Review The Jury's Relevant Market Findings. It Created Its Own.

A. Defendants attempt to mislead this Court as they did the Court of Appeals on the relevant product market issues.

The Court of Appeals devoted eighteen pages (A29-39, 41-47) to its ruling that plaintiffs did not prove that defendants monopolized the *production* of all stone, sand and asphalt. *That was not even the issue.* Defendants mislead this Court when they say (Opp. at 16) that this was the "market definition presented by plaintiffs at trial . . . and the market definition given to the jury." *That was not plaintiffs' contention; that was not the market definition given the jury; and that was not the jury's finding.* The trial court instructed the jury on the parties' contentions (JA 205, 210-11):

> This is an antitrust case in which plaintiffs claim defendants have violated Section 2 of the Sherman Act by monopolizing and/or attempting to monopolize the bidding on and performance of Ohio Turnpike Commission and Ohio Department of Transportation contracts *and the supply of highway stone, sand and asphalt in such markets.*
>
> * * * * *
>
> *Plaintiffs contend* that there are four different product markets. They are . . . the production and supply of [1] stone . . . [2] sand . . . and [3] asphalt *used on ODOT and OTC paving contracts;* and [4] the bidding on and performance of paving contracts awarded to prime contractors by ODOT and OTC. In the alternative, plaintiffs contend that ODOT and OTC are also separate relevant markets for measuring competitive effects. *Defendants contend* that the appropriate relevant markets are: (1) *the production and supply of all limestone, not just limestone used on ODOT and OTC paving projects;* (2) *the production of all asphalt not just that used on ODOT and OTC paving projects;* (3) bidding on ODOT paving contracts; and (4) bidding on OTC paving contracts which is separate from ODOT bidding.

The jury answered "yes" to each of the relevant market interrogatories, finding in favor of plaintiffs' contentions that the defendants had monopolized stone, sand and asphalt "*used in* ODOT and/or OTC asphalt paving contracts," and the paving projects themselves (Ans. to Spec. Itgs. 1-5, 8-9; A75-80).

But the Court of Appeals inexplicably ignored those findings and drew its own *de novo* conclusion that plaintiffs had to prove *defendants'* contention, a contention the jury must be presumed to have rejected. Appellate courts are supposed to review the jury's findings and see if there is evidence to support them. They must defer to the jury's findings under the Seventh Amendment. The Court of Appeals ignored those findings, created its own relevant product market (all stone produced for whatever use) as a strawman and then blew it down with eighteen pages of immaterial discussion that defied the jury's findings. *That* is usurpation of the jury's fact finding mission, not simply weighing the sufficiency of the evidence as defendants argue. If courts of appeal can ignore jury findings and create their own relevant markets, then the Seventh Amendment is no longer a safeguard.

B. Defendants make no response to the geographic market issue.

If the defendants monopolized asphalt paving in the whole thirteen county area, did all plaintiffs (who competed within the thirteen counties) have to prove separately (as the Court of Appeals held) that defendants also monopolized *each county within the thirteen*? That is the legal issue (which Respondents studiously avoid) and it is an important one any time multiple plaintiffs sue the same monopoly. The Court of Appeals' ruling refuses to recognize the "economic reality" that the sum includes the whole of its parts as this Court held in *United States v. Grinnell*, 384 U.S. 563, 576 (1966) (Petition p. 21).

Defendants ignore *Grinnell* and the salient legal issue by resorting to evidentiary conclusions on which, of course, the jury and the trial judge found against them. The defendants' monopoly power in the thirteen counties obviously permeated the individual thirteen counties whether or not they physically had quarries, plants or monopoly market shares in each of the individual counties. Highways run between, among and through the counties; they are not locally contained. Furthermore, defendants leveraged their power from the whole to distort competition in each of the composite parts (Petition p. 22).

IV. Defendants Offer No Meaningful Response To Sader's Petition. The Court Preempted The Jury's Function In Reversing Sader's Award.

Defendants claim "Sader's claim was infirm for four reasons (A29)" (Opp. at 17). This is no response.[6] Defendants owned "an indispensable facility," the *only* quarry and asphalt plant for thirty miles roundtrip (*J.N.O.V.* Opn. A94-95). Defendants' refusal to deal (even for cash) to punish Sader was a jury issue. The Court of Appeals itself was "persuaded" that Sader's refusal to deal claim "had arguable merit" (A22). The only way the Court could have resolved the "arguable merit" issue against Sader was by weighing the evidence in contravention of the Seventh Amendment, which it did in reversing Sader's award.

V. Denying All Attorney's Fees And Costs For Nine Years To A Successful Antitrust Plaintiff Is Unconscionable On Its Face; It Is Not A Matter Of Discretion.

The Court of Appeals did not review the District Court's fee award for abuse of discretion (Opp. at 17) because the trial court did not exercise any discretion.

[6] Two of the four "reasons" were never raised, briefed or argued (Issues Presented, A127-28). This is further evidence of the court's overarching willingness to reach issues beyond the scope of review and make its own findings of fact contrary to the Seventh Amendment.

(Alternatively, it was a flagrant abuse.) The Court held *as a matter of law* (A106) that Langenderfer was not entitled to any fees or costs for the first nine years of this litigation because the claims in *Langenderfer I* and *Langenderfer II* were "distinct in all respects" (*Id.*). This is untenable on its face. As defendants admit even now: "The two cases which contained essentially the same allegations were consolidated for trial." (Opp. at 2). The Court's denial mocks the leading cases, including *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983), discussed in the Petition (pp. 26-27). Without reversal, such a result will plague attorney fee determinations for years to come.

VI. *Bonjorno* Does Not Control The Interest Decision Herein. The Decision Creates A Major Conflict In The Circuits.

Defendants argue that the denial of post-judgment interest is compelled by *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 110 S. Ct. 1570 (1990). In *Bonjorno,* a concededly disputed damages amount was at the heart of the case and was not settled until the second judgment. In this case, by contrast, the *amount* of the Langenderfer and NOAP damages was not disputed. The damages ascertained by the first jury in 1980 were encompassed in the greater award returned by the second jury. Three Circuit Courts have recent decisions squarely contrary to the decision herein (Petition pp. 27-28). Where a second judgment on retrial includes the same damages as found by the original jury, interest runs from the original judgment on the lesser included amount (Petition pp. 27-28). This question will arise whenever larger judgments are awarded on retrial.

CONCLUSION

Plaintiff's Petition raises important questions involving application of the Seventh Amendment, appellate due process and major antitrust principles. The issues have broad impact and apply to almost any case

involving the limited scope of review and the power of an appellate court to overturn jury verdicts. Petitioners did not have a fair hearing in the appellate court—it is shocking that they never even had a chance to brief or argue the issues on which the court reversed because the issues were never presented.[7] They did not receive the minimal due process which they had a right to expect from an appellate court. The Court of Appeals "has so far departed from the accepted course of judicial proceedings . . . as to call for an exercise of the Court's power of supervision." (S.Ct. R.10.1(a)).

Obviously, this Court's decision in *Matsushita* has inspired some courts to substitute their own version of "economic reality" in summary judgment proceedings. Whatever the impact of *Matsushita* in the summary judgment process, it should not apply to full-blown jury trials as was done here. The tension persists between *Matsushita* and the Seventh Amendment (Petition p. 14) and is of consummate importance to the scope of appellate review following a jury trial. The Petition herein presents a rare opportunity to confront the issue on clear cut grounds. The Petition should be granted.

August 8, 1991

Respectfully submitted,

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[7] Plaintiffs' Petition for Rehearing and Rehearing *En Banc* raising the identical issues at stake here was denied without comment (A122-23).

[JA285] DEFENDANTS' MOTION FOR NEW TRIAL

Civil Action No. C76-425
No. C83-1144

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

v.

S. E. JOHNSON COMPANY, *et al.*,
Defendants.

JUDGE JOHN W. POTTER

Defendants move the Court, pursuant to Rule 59, Fed. R. Civ. P., to set aside the verdict of the jury and the judgment entered in this action on October 2, 1986, and to grant a new trial on the following grounds:

1) the verdict is contrary to the law;

2) the verdict is contrary to the clear weight of the evidence;

3) the evidence is insufficient to show that the acquisitions or covenants not to compete lessened competition or gave defendants monopoly power;

4) the evidence is insufficient to show any monopoly power;

5) the evidence is insufficient to show any predatory or anticompetitive conduct;

6) the evidence is insufficient to show antitrust injury;

7) the evidence is insufficient to establish relevant markets;

8) the Court erred in denying defendants' motion for directed verdict on the Section 2 claims;

[JA286] 9) the Court erred in admitting evidence that defendants bid lower than the statewide average and lower than competitors' cost plus overhead;

10) the Court erred in admitting evidence that combined the market share of France and defendants;

11) the Court erred in admitting evidence of damages from losses on jobs won;

12) the Court erred in admitting evidence of damages outside the relevant market; and

13) the Court erred in denying defendants' motion for separate trials.

The grounds in support of this Motion are set forth in the Memorandum in Support of Motion for Judgment *N.O.V.* or, in the Alternative, for New Trial filed

simultaneously herein. In addition, this Motion is based upon the record and proceedings in this action.

Respectfully submitted,

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Date: October 10, 1986